Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

GAIL JOHNSON,

Petitioner,

v.

NORDSTROM, INC., RICHARD ARCHER and JAMES JOHANSSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES A FEDERAL COURT COMMIT REVERSIBLE ERROR WHEN IT ISSUES A DECISION THAT IGNORES AND CONFLICTS WITH THIS COURT'S DECISION IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000)?

II. DOES A FEDERAL COURT'S DECISION CONFLICT WITH FEDERAL LAW WHEN IT ENTERS SUMMARY JUDGMENT AGAINST THE EMPLOYEE IN A RACE DISCRIMINATION CASE WHERE THE EVIDENCE DEMONSTRATES THAT THE EMPLOYER'S PROFFERED BUSINESS REASON HAS CHANGED AND CONFLICTS WITH THE REASONS ORIGINALLY GIVEN BY THE EMPLOYER FOR ITS ACTIONS?

III. DOES A FEDERAL COURT'S EVIDENTIARY RULING REQUIRE REVERSAL WHERE THE EXCLUDED EVIDENCE DEMONSTRATED THAT THE EMPLOYER TOLERATED AND PERMITTED A RACIST ENVIRONMENT AND DISCRIMINATION WHICH RESULTED IN THE DENIAL OF PROMOTIONS AND RETALIATION AGAINST BLACK EMPLOYEES?

IV. DOES A FEDERAL COURT VIOLATE AN EMPLOYEE'S SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY WHEN IT GRANTS OR AFFIRMS SUMMARY JUDGMENT IN FAVOR OF THE EMPLOYER ON TITLE VII AND §1981 RACE DISCRIMINATION AND RETALIATION CLAIMS WHEN THE FACTS MOST FAVORABLE TO THE EMPLOYEE DEMONSTRATED BOTH A *PRIMA FACIE* CASE AND PRETEXT?

PARTIES TO THE PROCEEDINGS

PETITIONER

Petitioner is Gail Johnson, a Citizen of the State of Indiana and the United States of America.

RESPONDENTS

James Johansson and Richard Archer were Citizens of the State of Indiana at all times pertinent to this case.

Nordstrom, Inc. is a Washington corporation, with no subsidiaries and its principal place of business in Seattle.

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Gail Johnson respectfully requests that this Court issue a *writ of certiorari* to review the judgment entered in this case by the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit in *Johnson v. Nordstrom, Inc. et al.* is reported at 260 F. 3d 727 (7th Cir. 2001) and reproduced in Appendix B at pages 3a to 18a.

The Memorandum Decision of the District Court for the Southern District of Indiana, is unreported and is reproduced in Appendix D at pages 21a to 73a. The Final Judgment is reproduced in Appendix C at pages 19a to 20a.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals for the Seventh Circuit was issued on July 20, 2001, affirming the Summary Judgment Decision of the District Court of the Southern District of Indiana. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the Seventh Circuit on August 14, 2001. The Rehearing Order is reproduced in Appendix A at pages 1a to 2a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution Amendment VII.

The Seventh Amendment to the United States Constitution provides in pertinent part that: "The right of trial by jury shall be preserved...."

2. Civil Rights Act, 42 U.S.C. §1981

Sec 1981. Equal Rights Under the Law.

(a) Statement of equal rights.

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined.

> For purposes of this section, the term "make and enforce contracts" includes the making, performance,

modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment.

The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

3. **Civil Rights Act, 42 U.S.C. §1981a et seq.**

Sec. 1981a. Damages in cases of intentional discrimination in employment.

(a) Right of recovery.

(1) Civil rights.

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the

complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * *

(b) Compensatory and punitive damages.

(1) Determination of punitive damages.

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages.

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)).

(3) Limitations.

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party - ...(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction.

> Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial.

> If a complaining party seeks compensatory or punitive damages under this section -

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

* * *

4. Civil Rights Act, 42 U.S.C. §2000e et seq.

UNLAWFUL EMPLOYMENT PRACTICES
SEC. 2000e-2. *[Section 703]* (a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Procedural Background.

This appeal arises from a Complaint for Damages filed by Appellant, Gail Johnson, against Nordstrom, Inc., James Johansson and Richard Archer (collectively referred to as "Nordstrom"). Johnson alleged racial employment discrimination, retaliation and constructive discharge, all in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (Title VII) and 42 U.S.C. §1981. Johnson also alleged a state claim for intentional infliction of emotional distress.

On September 26, 2000, the District Court granted Nordstrom's Motion for Summary Judgment on all claims asserted by Johnson and partially granted a motion to strike evidence. (App.D at 21a to 72a). The District Court concluded that Johnson had not demonstrated a *prima facie* case on her claims for discriminatory failure to promote. The District Court also concluded that although Johnson demonstrated a *prima facie* case of retaliation, the evidence did not demonstrate pretext. The District Court provided no analysis for its granting of summary judgment on Johnson's constructive discharge claims. The court also granted summary judgment on Johnson's state claim for intentional infliction of emotional distress, concluding Nordstrom's conduct was not extreme or outrageous. A final judgment was issued on these entries. (App. C at 19a-20a)

Johnson appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit. Johnson argued that the District Court erred in its decision by not properly stating facts and inferences most favorably to her claims, and by not following the Summary Judgment, Title VII and §1981 rules of law. Specifically, Johnson argued the District Court erred in concluding she had not presented sufficient evidence on the *prima facie* case and pretext elements of her race discrimination and retaliation claims. Also, Johnson argued the court erred in striking her circumstantial evidence of Nordstrom's racial discrimination.

The Seventh Circuit rejected Johnson's arguments and affirmed the District Court. The court refused to address Johnson's argument concerning her *prima facie* case and instead rejected her claims by holding the evidence did not demonstrate pretext. The Seventh Circuit did not acknowledge, distinguish or follow the rules set forth by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530

U.S. 133 (2000). The Seventh Circuit also held that the District Court's striking of evidence did not constitute reversible error.

Johnson sought rehearing and requested a rehearing *en banc* on August 1, 2001. The Seventh Circuit denied rehearing on August 14, 2001. Johnson then timely filed this Petition for Writ of Certiorari.

B. Factual Background.

Johnson is an African American Female. Nordstrom is a retail department store with a location in downtown Indianapolis, Indiana. James Johansson, a male Caucasian, was the Store Manager. Richard Archer, a male Caucasian, was the Manager of the Cosmetic Department from November, 1996 to January, 1998.

Johnson has worked in cosmetics as a Salesperson and Manager for much of her adult life. In 1995, when Nordstrom opened its Indianapolis store, Johnson was hired to work as a salesperson for the Clinique cosmetic line. Six months after she was hired, Johnson was transferred to the men's fragrance counter to work as a Fragrance Counter Manager. Johnson was a top rate salesperson. Johnson performed her work without complaint and did not steal or "shark" other salesperson's customers.

1. Beauty Director Promotion.

In February of 1997, Johnson sought a promotion to the position of Beauty Director. This position was a non-management position, but provided more compensation. Nordstrom did not post this promotional opportunity and treated it and other promotions informally. Archer was

responsible for selecting the person for the Beauty Director position. Nordstrom had no written promotion policy or criteria for selecting individuals for promotions. Instead, Nordstrom relied upon inconsistent and "unspoken rules". The promotional process was controlled completely by Archer as the Department Manager without interference from Nordstrom. Archer made his decision on subjective criteria, i.e. that the selected individual had more seniority and "a better feel for the Nordstrom customer." (App. F, p.76a; App. I, p.91a).

Archer interviewed Johnson for the Beauty Director position and knew of her experience and qualifications. Archer, however, selected Deanne Bennett, a Caucasian, with less experience in cosmetics. At the time Archer made his decision, Johnson had over thirteen (13) years of cosmetic experience on over ten (10) lines of cosmetics with six (6) months as a full-time employee at Nordstrom. Bennett had approximately two (2) years total experience with one and one-half (1 ½) years cosmetic experience at a Nordstrom located in California. Bennett's experience was on only one (1) line of cosmetics. (App. I, p.93a)

Johnson questioned both Johansson and Archer after the decision was made to promote Bennett and pointed out that she had more experience in cosmetics. Archer responded by saying "experience and qualifications had nothing to do with his decision" and that he selected Bennett because she had more seniority at Nordstrom and had a "better feel for the Nordstrom customer." (App. F, p. 76a; App. I, p. 91a). Johnson filed a charge of discrimination against Nordstrom with the EEOC. Nordstrom and Archer creatively changed their reason for the promotion decision and contended that Johnson was not qualified and that Bennett was more qualified than Johnson.

2. Assistant Manager Promotion.

In April, 1997, Archer sought to fill the position of Assistant Manager in the Cosmetic Department. Again, this promotional opportunity was not posted and no written criteria for selection existed. Archer had unfettered control of the promotional process. Archer did not interview or consider Johnson for the Assistant Manager position. Archer promoted Lynette Irwin, a Caucasian, to the Assistant Manager Position. Irwin had previously worked as a part-time salesperson. Irwin had only two (2) months part-time experience at Nordstrom. In fact, Johnson had trained Irwin. Before the promotion Irwin did not supervise Johnson. Johnson complained to Nordstrom and filed a charge of discrimination with the EEOC based on the failure to promote her to the Assistant Manager position because of her race and in retaliation for filing the previous EEOC charge. Nordstrom claimed Johnson was not considered because she was not interested in the position. Johnson, however, had indicated her desire to be promoted to the Assistant Manager position. Nordstrom at that time did not challenge Johnson's qualifications for the job. After suit was filed Nordstrom then claimed Johnson was not qualified and that Irwin was more qualified for the job.

3. Retaliation and Constructive Discharge.

After Johnson complained and filed her charges of discrimination, Nordstrom retaliated against Johnson. Archer and Irwin saved stock work for Johnson. Although they could not substantiate their allegations, they also accused her of stealing customers. In fact, Archer attempted to have Johnson investigated by Nordstrom's Internal Security Department. However, Archer could not produce any facts to support such an investigation. Archer had not asked that any other

employee be investigated. In the presence of a third-party, Irwin advised Johnson that she was being monitored. By her own admittance, Irwin did not monitor anyone else. In fact, Irwin allowed other employees to falsely accuse Johnson. Also, Irwin gave sales leads to other employees to Johnson's detriment and Irwin falsely stated that Johnson no longer worked at Nordstrom. Irwin also advised other employees to come in early to do stock work so as not to spend time off the sales floor, but did not advise Johnson. Archer likewise treated Johnson badly.

On November 4, 1997, due to the stress created by the racist environment at Nordstrom, Johnson resigned. Johnson filed another charge of discrimination for constructive discharge and retaliation on December 9, 1997.

4. Circumstantial Evidence of Racially Discriminatory Environment.

Nordstrom knew that other employees had complained about Archer refusing to consider them for a promotion because of race. Archer also refused to allow a black fragrance model to work at Nordstrom. After Archer left Nordstrom, the black fragrance model was allowed to return to work at Nordstrom.

Nordstrom also had at least eleven (11) other charges of discrimination. Karen Gall, the Human Resources Director, handled the investigation of these complaints, and also the ones filed by Johnson. Gall admitted that she did not interview Johnson or any other possible witnesses concerning Archer's alleged racial misconduct. Instead, Gall merely talked to Archer and took no further action. Gall never discussed the allegations of race discrimination with Irwin. Gall never took corrective action with respect to race

discrimination complaints.

Other African-American employees also experienced racial discrimination, Ruby Harris, Laura Dewes, Jennifer Cottman, Harry Dunn, Patrece Williams, Yvonne Mason and Gwen Holman all believed race discrimination existed at Nordstrom. In fact, Dewes was disciplined for serving a black customer as opposed to a white customer. Ruby Harris was called a "nigger bitch" by a white employee. (App.H at 88a) The same white employee had made a comment during the O.J. Simpson trial that "niggers just do stuff like that." (*Id.*) When Harris complained to Nordstrom, Johansson told her she was crazy and that she did not hear what she did. (*Id.* at 89a) Instead of investigating or disciplining the white employee, the employee was named "Employee of the Month." (*Id.* at 89a) In essence, Nordstrom endorsed the racially hostile environment and the racially discriminatory misconduct.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S AND SEVENTH CIRCUIT'S DECISIONS ARE ERRONEOUS AND CONFLICT WITH THIS COURT'S PRIOR DECISION IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000).

The District Court and the Seventh Circuit Court of Appeals erred when they granted and affirmed Summary Judgment in favor of Nordstrom and against Johnson on her race discrimination and retaliation claims brought under Title VII and §1981. In *Reeves,* this Court held that evidence

creating a question of fact on qualifications for purposes of the *prima facie* case element also could be used to demonstrate the pretext element. *Reeves*, 530 U.S. at 143. Specifically, this Court wrote "the trier of fact may still consider the evidence establishing the Plaintiff's *prima facie* case and inferences properly drawn therefrom. . . .on the issue of whether the Defendant's explanation is pretextual." *Reeves*, 530 U.S. at 143.

Here, the Seventh Circuit summarily dispensed with any consideration of the *prima facie* case element. (App. B, p. 9a). Instead, the court went straight to the issue of pretext, relying on Seventh Circuit precedent that pre-dated this Court's ruling in *Reeves*. In so doing, the Seventh Circuit directly contravened this Court's decision in *Reeves*. The Seventh Circuit, by not addressing the evidence on the element, assumed without deciding that the evidence created a question of fact on the *prima facie* case element. (App. B at 8a-9a). In fact, the District Court held that Johnson proved her qualifications for purposes of the *prima facie* case on the Assistant Manager position. (App. D, p.60a).[1] However, the District Court and Seventh Circuit then contradictorily concluded that the evidence did not create a question of fact on the pretext element, despite the fact that the employers post hoc reason was based on Johnson's qualifications.

The Seventh Circuit decision cannot be upheld under *Reeves*. If the evidence of qualifications created an issue of

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[1] The District Court erroneously reached the exact opposite conclusion with respect to the Beauty Director position. (App. D, p. 60a) However, the facts and inferences most favorable to Johnson shows she also was qualified for the Beauty Director position.

fact on the *prima facie* case element, it also created an issue of fact on the pretext element. The Seventh Circuit totally ignored the foregoing, and in fact, did not even acknowledge or attempt to distinguish its decision from the facts or rules set out by this Court in *Reeves*. In making their rulings, both the District Court and Seventh Circuit erred.

Here, the evidence most favorable to Johnson demonstrated that she was qualified for both the Beauty Director and Assistant Manager positions. Johnson had thirteen years of cosmetics experience on ten different lines. She was a good employee and was not perceived as a shark. Finally, Johnson was the top sales producer, was motivated and a motivator and had "remarkable supervisory skills". (App. E, p. 74a). In fact, Johnson trained Lynette Irwin (the person given the Assistant Manager promotion). Thus, Johnson established the *prima facie* case element.

Johnson also demonstrated pretext. Originally, Nordstrom told Johnson the decisions had nothing to do with qualifications. In fact, with respect to the Assistant Manager position, Nordstrom claimed Johnson was not even considered because they did not think she was interested in the position. Only after the Complaint was filed, depositions were taken and summary judgment was sought did Nordstrom claim relative qualifications and performance were the reasons for the promotion decisions. By changing its reasons and relying on qualifications, Nordstrom created an inference of pretext which precluded the entry of summary judgment. *Reeves*, 530 U.S. at 147-48 (noting employer's shifting explanations may demonstrate pretext). In addition to the foregoing evidence on qualifications and the shifting explanations for Nordstrom's conduct, the evidence demonstrated a racially discriminatory environment at Nordstrom that was ignored by top management. Also, the evidence demonstrated that the

alleged decision maker treated blacks less favorably than whites.

As the Seventh Circuit correctly noted, "Johnson's burden was to show that Nordstrom lied when it stated that it believed Johnson was unqualified for the Beauty Director position, or when it stated it believed Bennett was more qualified." (App. B, p. 9a). However, the Court incorrectly did not consider the evidence establishing her qualifications and the *prima facie* case when addressing the pretext element. The Seventh Circuit also failed to acknowledge and follow *Reeves*. The evidence created a *prima facie* case on qualifications and, as noted by this Court *Reeves*, it also created a question of fact on pretext. Such a conclusion is especially true, where, as here, the employer's explanations have changed. *Reeves*, 530 U.S. at 147-48. Therefore, this Court should grant Johnson's Petition for Writ of Certiorari and should reverse the District Court and Seventh Circuit Court of Appeal's Summary Judgment entries.

II. THE DECISIONS CREATE A CONFLICT WITHIN THE SEVENTH CIRCUIT AND AMONG THE OTHER CIRCUITS WITH RESPECT TO THE EVIDENCE REQUIRED TO DEMONSTRATE PRETEXT FOR PURPOSES OF FEDERAL RULE 56.

As noted previously, this Court established the rules for proving the pretext element of a discrimination claim under Federal Rule 56 in the *Reeves* decision. In part, the Court concluded that pretext does not require direct evidence of a lie. *Reeves*, 530 U.S. at 147. The Seventh Circuit and District Court's decisions, however, circumvented and ignored this Court's ruling and instead has required direct

evidence of a lie and has created a "pretext plus" rule of law. The decisions should not be allowed to stand because they not only conflict with this Court's decision, but also with other decisions from the Seventh Circuit and decisions from other Circuits. The courts also ignored the facts and inferences most favorable to Johnson. The decision cannot stand as it presently exists. To not reverse the decisions would deprive Gail Johnson of her right to a trial on the merits and would create a rift in federal discrimination law. Therefore, this Court should grant Johnson's Petition for Writ of Certiorari and reverse the Seventh Circuit's decision.

a. The Panel Decision Conflicts With Existing Seventh Circuit Precedent on the Pretext Element.

The Panel decision concluded that the evidence of race discrimination presented by Johnson against Nordstrom failed to demonstrate pretext. The Panel decision conflicts with the decisions of *Gordon v. United Airlines, Inc.*, 246 F.3d 878 (7th Cir. 2001) and *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir 2001). In both *Gordon* and *Lawson*, the Seventh Circuit held that the pretext element of a discrimination claim is demonstrated when an employer gives inconsistent or shifting reasons for its decisions. The Seventh Circuit attempted to distinguish the foregoing cases by suggesting that Nordstrom had not given conflicting reasons for its actions, but had merely "supplemented its explanations." (App. B p. 11a) The Seventh Circuit could not be more wrong.

Nordstrom first claimed its decision not to promote Johnson had "nothing to with her qualifications" with respect to the Beauty Director position, and with respect to the Assistant Manager position, claimed "Johnson was not

interested" in the position. (App.B at 5a). Thereafter, Nordstrom claimed qualifications and performance were the reasons for the decisions. If Nordstrom honestly believed the post hoc reasons, why are they different and exactly the opposite to the original reasons given for its actions? The answer is simple: they are pretextual reasons. As in *Reeves, Gordon* and *Lawson*, the reasons for Nordstrom's conduct were also shifting. A jury may conclude Nordstrom was lying. Therefore, the District Court and Seventh Circuit erred and the Petition for Writ of Certiorari should be granted.

b. The Panel Decision Conflicts With Decisions From Other Circuits.

Several other Circuits conflict with the decision made in this case. The First, Second, Fourth, Sixth, Eighth and Ninth Circuits all have held that an employer's provision of differing reasons for its decision provides evidence of pretext sufficient to preclude entry of summary judgment. *Domingues-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000); *Zimmermann v. Assoc. First Capital Corp.*, 251 F.3d 376, 383 (2nd Cir. 2000); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2nd Cir. 1994); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 852-53 (4th Cir. 2001); *Alvarado v. Bd. of Trustees of Montgomery Comm. College*, 928 F.2d 118, 122-23 (4th Cir. 1991); *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996); *Korbin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998); *Washington v. Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1993). Here, Nordstrom's original explanations have changed and created a question of fact as to what they "honestly" believed. Therefore, the Seventh Circuit erred, summary judgment

should have been denied, and the District Court's decision reversed and remanded for a trial on the merits.

c. The Decision Also Conflicts With The United States Supreme Court's Decision In *Reeves*.

In *Reeves*, the United States Supreme Court held that evidence creating a question of fact on qualifications for purposes of the *prima facie* case standard, also could be used to demonstrate pretext. *Reeves*, 530 U.S. at 143. The *Reeves* court also considered the evidence showing that the employer changed its reason for termination. Originally, the employer claimed the employee was fired due to falsification of pay records, but only introduced evidence of inaccuracy, not falsification. *Reeves,* 530 U.S. at 144. This evidence raised an inference of pretext which precluded entry of summary judgment. Here as in *Reeves*, the jury must resolve the conflicting inferences demonstrated by Johnson. Therefore, the Petition for Writ of Certiorari must be granted.

III. THE SEVENTH CIRCUIT AND DISTRICT COURT'S ANALYSIS OF THE EVIDENTIARY ISSUE DEPRIVED JOHNSON OF HER RIGHT TO USE CIRCUMSTANTIAL EVIDENCE TO ESTABLISH PRETEXT AND INTENTIONAL DISCRIMINATION.

The Seventh Circuit concluded the District Court's striking of the evidence submitted by Johnson in opposition to summary judgment did not constitute reversible error. However, the evidence included, among other items,

testimony from co-employees that demonstrated the racially hostile environment at Nordstrom which lead to Johnson's constructive discharge. That same evidence provides proof of the racially discriminatory environment that existed at Nordstrom. It also raises inferences which support a finding of intentional discrimination. Evidence of a racially discriminatory environment can be used to show intent. *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641-42 (11th Cir. 1998); *Huff v. UARCO, Inc.*, 122 F.3d 374, 380 (7th Cir. 1997); *Troupe v. May Dep't. Stores Co.*, 20 F.3d 734, 736-37 (7th Cir. 1994). If a racially hostile environment did not exist, why was a white employee given a reward after calling a black employee a "nigger bitch"? A jury could conclude that it was due to Nordstrom's tolerance or endorsement of racism. Therefore, this evidence was improperly excluded from consideration. A proper consideration of this evidence and the other evidence submitted by Johnson reveals that summary judgment should have been denied. Therefore, this Court should grant Johnson's Petition for Writ of Certiorari and correct the Seventh Circuit's error.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND IMPACT MANY OTHER CASES AS THE SEVENTH CIRCUIT DEPRIVED JOHNSON OF HER RIGHT TO A JURY TRIAL.

This Court correctly established the balance in discrimination cases between a right to a trial by jury and the application of Federal Rule 56 in the *Reeves* decision. The court determined that the right to a jury trial must be preserved if the facts or reasonable inferences to be drawn therefrom create a question of fact on the *prima facie* case and

pretext elements. This holding is critical to the rights of every plaintiff who asserts a race or other discrimination claim under Title VII or §1981. The entry of summary judgment under Federal Rule 56 must be restricted to weed out only deficient claims. If it is not limited, then legitimate claims of discrimination will be barred from being heard at a trial on the merits. Such application would infringe upon the rights granted by the United States Constitution.

By granting Summary Judgment, the Seventh Circuit subverted these constitutionally based restrictions and denied Johnson her right to a jury trial on the merits of her discrimination claims. This decision contravenes not only this Court's decision, but also conflicts with other decisions from the Seventh Circuit and other federal courts. *Reeves* 530 U.S. at 153-54; *Gordon*, 246 F.3d at 893; *Lawson*, 245 F.3d at 931-932; *Domingues-Cruz*, 202 F.3d at *432; Zimmermann*, 251 F.3d at 383; *Ethan Allen*, 44 F.3d at 120; *Sears Roebuck*, 243 F.3d at 852-53; *Alvarado*, 928 F. 2d at 122-23; *Thurman*, 90 F. 3d at 1167; *Korbin, 34 F. 3d at 703; Godwin*, 150 F.3d at 1222; *Washington*, 10 F. 3d at 1434. The viability of a Plaintiff's claim should not be dependent upon the venue of the case or the panel of judges appointed to the appeal. Therefore, this Court should take this case to resolve the conflicts and to restore the rights afforded to Plaintiffs who have been illegally discriminated against by their employers.

CONCLUSION

This Court should grant certiorari and review the decision of the United States Court of Appeals for the Seventh Circuit, because the District Court and Court of Appeals ignored and then controverted this Court's decision in *Reeves*. This Court also should vacate and reverse the Summary Judgment decision and remand for a trial on the merits, because Johnson provided sufficient evidence of discrimination. A contrary action condones the Seventh Circuit's errors and endorses Nordstrom's racially discriminatory conduct.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-3827

August 14, 2001, Decided

GAIL JOHNSON, *Plaintiff-Appellant*,

v.

NORDSTROM, INC., JAMES J. JOHANSSON and RICHARD J. ARCHER, *Defendants-Appellees*.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division
No. 97-C-1673
Richard L. Young, Judge.

JUDGES

Hon. William J. Bauer, Circuit Judge,
Hon. Richard D. Cudahy, Circuit Judge,
Hon. Frank H. Easterbrook, Circuit Judge

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-captioned case by plaintiff-appellant, no judge* in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

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* Hon. Kenneth F. Ripple took no part in the consideration or decision of this case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-3827

July 20, 2001, Decided

GAIL JOHNSON, *Plaintiff-Appellant*,

v.

NORDSTROM, INC., JAMES J. JOHANSSON and RICHARD J. ARCHER, *Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division
No. 97-C-1673
Richard L. Young, Judge.

JUDGES

Hon. William J. Bauer, Circuit Judge,
Hon. Richard D. Cudahy, Circuit Judge,
Hon. Frank H. Easterbrook, Circuit Judge

OPINION

Cudahy, *Circuit Judge.*

Gail Johnson appeals a grant of summary judgment to Nordstrom, Inc. on her Title VII claims of employment discrimination, retaliation and constructive discharge. We affirm.

I.

Johnson was hired in 1995 to work as a salesperson in the cosmetics department at Nordstrom's retail department store in downtown Indianapolis. Six months after she was hired, Johnson was transferred to the men's fragrance counter to work as a fragrance counter manager. In February 1997, Johnson sought a promotion to the intriguing position of beauty director. At the time, she had more than 13 years of cosmetics experience. Richard Archer, who was then the manager of the cosmetics department, was responsible for filling the beauty director position. Archer interviewed Johnson and was aware of her experience and qualifications for the job. But he selected another employee for the position--one who, Johnson alleges, had only two years of cosmetics experience. When Johnson questioned Archer about his decision, he told her he had selected the other employee because she had more seniority at Nordstrom and she had a "better feel for the Nordstrom customer."

Johnson, an African-American, filed a charge of race discrimination against Nordstrom with the Equal Employment Opportunity Commission (EEOC). In response, Nordstrom indicated that Johnson was not qualified for the beauty

director position, and that Deanne Bennett, the (white) person who got the job, was more qualified. Nordstrom claimed that Johnson, during her interview for the job, said she believed the most important part of the job was "sales," although that was incorrect because the position primarily involved training and other interaction with co-workers. Nordstrom did not believe Johnson would be qualified for this aspect of the job because she was perceived by her co-workers as a "shark"--apparently a retail term for a sales employee who serves more than one customer at a time, thereby depriving co-workers of commission opportunities. This perception was a source of tension between Johnson and her co-workers. And Bennett had superior Nordstrom experience: Johnson at the time had six months experience with Nordstrom, while Bennett had worked there for three years. In April 1997, another white employee was promoted, this time to the position of assistant manager. Archer, without considering Johnson for the position, gave the job to Lynette Irwin, who had two months of part-time experience at Nordstrom. But unlike Johnson, Irwin had management experience at Nordstrom; in fact, she had served as Johnson's supervisor. Johnson filed another charge of discrimination with the EEOC. Nordstrom responded that Johnson was not considered for the position because Archer believed she was not interested in it. Nordstrom later indicated that Johnson did not exhibit the leadership and team-playing skills Archer was seeking for the position.

Johnson's retaliation claim is two-fold. First, she claims that Nordstrom retaliated against her for filing the first EEOC charge by failing to promote her to the assistant manager position. Second, she claims that Archer and Irwin took specific retaliatory actions against her: they "saved stock

work" for her and they wrongly accused her of stealing customers from other salespersons. Further, Johnson alleges that Irwin allowed other employees to falsely accuse her, gave sales leads to other employees and advised them to come to work early to do stock work so they would not lose time off the sales floor. Archer and Irwin apparently also monitored Johnson to determine whether she was in fact stealing customers. In November 1997, Johnson resigned.

Johnson filed a complaint against Nordstrom, James Johansson (the store manager) and Archer under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. She alleged race discrimination in the failure to promote her, retaliation and constructive discharge. As noted, her retaliation claim consisted of, inter alia, Nordstrom's failure to promote her to the assistant manager position and Irwin's and Archer's retaliatory conduct. Johnson also alleged a state claim for intentional infliction of emotional distress. In response, Nordstrom filed a motion for summary judgment and a motion to strike certain portions of affidavits filed by Johnson. Johnson filed a motion in opposition to summary judgment and a motion to strike affidavits submitted by Nordstrom. The district court denied Johnson's motion to strike, granted in part Nordstrom's motion to strike and granted Nordstrom's motion for summary judgment on all counts. It concluded that Johnson had not demonstrated a *prima facie* case on her failure to promote claim. The court also found that Johnson did not show that Nordstrom's reasons for failing to promote her were retaliatory; she could not prove that Nordstrom's stated reasons were pretextual. As to Archer's and Irwin's retaliatory conduct, the court concluded that Johnson failed to make a *prima facie* case. It also concluded that the conduct was not extreme or

outrageous, such that would support Johnson's claim for intentional infliction of emotional distress. Johnson appeals.

II.

As everyone should know, we review a grant of summary judgment *de novo,* viewing all the facts and inferences in the light most favorable to the non-moving party. *See Pafford v. Herman,* 148 F.3d 658, 665 (7th Cir. 1998). "Summary judgment may be granted only when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Pafford,* 148 F.3d at 665.

To defeat a motion for summary judgment in a Title VII case, a plaintiff who cannot provide direct evidence of discrimination may use the "burden-shifting" method outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Under this indirect method of proof, the plaintiff first may raise an inference of discrimination by offering sufficient evidence to establish a *prima facie* case. *See id.* at 802-05. If the plaintiff succeeds, the burden then shifts to the employer, who must articulate a "legitimate, nondiscriminatory reason" for the adverse action. *See Pafford,* 148 F.3d at 665 (citing *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)). "If the employer carries this burden, then the burden shifts back to the plaintiff to produce 'evidence that would, if believed by a trier of fact, show that the true reason for the employment action was discriminatory.'" *Pafford,* 148 F.3d at 665 (quoting *Sattar v.*

Motorola, Inc., 138 F.3d 1164, 1169 (7th Cir. 1998) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993))).

To establish a *prima facie* case of race discrimination in a failure to promote context, the plaintiff must show: 1) she is a member of a protected group; 2) she was qualified for the position sought; 3) she was rejected for the position; and 4) the employee promoted was not a member of the protected group and was not better qualified than the plaintiff. *See Payne v. Milwaukee Cty.*, 146 F.3d 430, 434 (7th Cir. 1998). It is undisputed that Johnson satisfies the first criterion. But the district court found that she failed to meet other elements of the *prima facie* case.

A.

The district court first concluded that Johnson had failed to make out her *prima facie* case of discrimination because she had not met her burden of showing that she was qualified for the beauty director position. The court found that the job consisted of training staff; directing the Nordstrom make-up team; overseeing promotional events and addressing staff questions and concerns. Entry on Plaintiff's Motion to Strike, Defendants' Motion to Strike, and Defendants' Motion for Summary Judgment at 36 (Sept. 26, 2000). The court concluded that Johnson was not qualified for this position because of 1) Johnson's interview answer (misstating the most important element of the position); 2) Johnson's tension with her co-workers; and 3) Johnson's failure to observe certain work policies. These factors do not appear to establish that Johnson was not qualified for the job. But we need not decide that issue; rather, we conclude that these are the

reasons proffered by Nordstrom for failing to promote Johnson, and that Johnson has failed to demonstrate that these reasons are pretextual. *See EEOC v. Our Lady of the Resurrection Med. Ctr.*, 77 F.3d 145, 150 (7th Cir. 1996) ("To expedite the process it may be preferable to get past the *prima facie* case and examine the pertinent issue of whether there was discrimination in a job action."); *see also Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1391 (7th Cir. 1990) (where the plaintiff had not met the burden of showing pretext, it was not necessary to decide whether the plaintiff established a prima facie case).

To demonstrate pretext, "a plaintiff must show more than that the employer's decision was incorrect; the plaintiff must also show the employer lied about its proffered explanation." *Abioye v. Sundstrand Corp.*, 164 F.3d 364, 368 (7th Cir. 1998) (citing *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995)). Without direct evidence of pretext, the plaintiff must "prove pretext indirectly by showing one of the following: (1) Defendant's explanation of Plaintiff's discharge had no basis in fact, or (2) the explanation was not the 'real' reason, or (3) at least the reason stated was insufficient to warrant the [allegedly discriminatory action]." *Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1133 (7th Cir. 1994) (citing *Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 (7th Cir. 1989)).

Thus, Johnson's burden was to show that Nordstrom lied when it stated that it believed Johnson was unqualified for the beauty director position, or when it stated that it believed Bennett was more qualified. Johnson's subjective belief that she was better qualified than Bennett does not, without more, demonstrate pretext. *See Johnson v. University of Wisconsin-*

Eau Claire, 70 F.3d 469, 481 (7th Cir. 1995).

Johnson takes issue with the district court's reliance on her alleged interview answer stating that sales would be the primary aspect of the beauty director's job. Johnson claims that "even if she did [give that answer], that was not necessarily a wrong answer, because increased sales, indirectly, through the training of Cosmetics Associates, is the ultimate goal of any retailer . . . ." This, however, does not undermine the employer's honest belief that sales was not the main aspect of the job, and that Johnson indicated in her interview that she was unaware of this fact. Even viewing these facts in the light most favorable to Johnson, whether the interview answer was right or wrong is for Nordstrom to decide, and does not demonstrate that this reason for failing to promote Johnson was pretextual. *See Hartley v. Wisconsin Bell, Inc.,* 124 F.3d 887, 890 (7th Cir. 1997) ("Plaintiffs lose if the company honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless.") (citing *McCoy v. WGN Continental Broadcasting Co.,* 957 F.2d 368, 373 (7th Cir. 1992)).

Johnson also argues that her "stealing" of customers and violation of work rules were disputed. Whether she stole customers or not is irrelevant; what is relevant is the undisputed fact that her co-workers thought she did. Johnson has failed to demonstrate that this was a false justification for Nordstrom's refusal to promote her. Likewise, the disputed allegation that Johnson violated several workplace policies was not shown to be pretextual--simply disputed. It is well established that an employer is free to develop its own criteria in determining whom to promote, and Johnson has failed to demonstrate that these were not Nordstrom's true rationales.

See, e.g., Schaffner v. Glencoe Park Dist., 2001 U.S. App. LEXIS 15051, No. 00-4144, 2001 WL 748076, at *3 (7th Cir. July 5, 2001).

Johnson's "evidence" of pretext fails to indicate that Nordstrom's proffered reasons are not worthy of credence. For example, she claims that Nordstrom's promotion policies are not sensible. But it is not our place to evaluate the wisdom of an employer's business decisions. *See Gordon v. United Airlines, Inc.*, 246 F.3d 878, 889 (7th Cir. 2001) (citing *Stewart v. Henderson,* 207 F.3d 374, 378 (7th Cir. 2000)). We only require that an employer honestly believed its reason for its actions, even if its reason is "foolish or trivial or even baseless." *Brill v. Lante Corp.*, 119 F.3d 1266, 1270 (7th Cir. 1997); *see also Schaffner,* 2001 U.S. App. LEXIS 15051, 2001 WL 748076, at *4. Johnson's other "evidence" of pretext is equally unconvincing. She comes closest to the mark when she says that the alleged vacillation in Nordstrom's reasons for failing to promote her creates an issue of fact as to pretext. Johnson relies on our decisions in *Gordon and Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001). In both those cases, however, pretext was demonstrated by not only shifting but also conflicting, and at times retracted, justifications for adverse treatment. *See Gordon,* 246 F.3d at 890; *Lawson,* 245 F.3d at 931-32 & n.13. Here, Nordstrom simply supplemented its explanations in the context of EEOC charges and litigation; there has been no retraction of any of its reasons for failing to promote Johnson nor are any of its reasons inconsistent or conflicting. Thus, Johnson has failed to demonstrate that Nordstrom's legitimate, non-discriminatory reasons for failing to promote her to beauty director were pretextual.

B.

When considering the failure to promote Johnson to the assistant manager position, the district court again relied on criteria that seem more appropriately characterized as non-discriminatory reasons for failing to promote than evidence that Johnson was not qualified. Here the district court found that Johnson was qualified, but held that she failed to demonstrate that she was better qualified than Irwin, the employee who received the position. The court reasoned that Johnson demonstrated her qualifications by presenting evidence to dispute Nordstrom's claims that she stole customers, had tension with her co-workers, improperly utilized breaks and shirked stock work.

On the issue whether Johnson was more qualified than Irwin, Johnson argued that 1) Irwin was only part-time and had fewer years of experience; 2) the head of human resources was concerned about Irwin's qualifications for the job; and 3) Archer exhibited favoritism toward Irwin. The court noted that Irwin served as Johnson's supervisor prior to her promotion, and thus--unlike Johnson--had management experience within Nordstrom. Further, the court reasoned, the concerns about Irwin by the human resources chief do not show that she believed Johnson was more capable than Irwin. And third, simple favoritism cannot be the basis of a race-related complaint under Title VII.

As with the beauty director position, we decline to consider whether Johnson demonstrated a *prima facie* case for the assistant manager promotion because again she failed to meet her burden of demonstrating that Nordstrom's proffered reasons were pretextual. Johnson offered nothing to refute the

legitimate, nondiscriminatory reason advanced: "Nordstrom, through manager Archer, honestly believed that she did not possess leadership skills required for a management position . . . ." Entry on Plaintiff's Motion to Strike, Defendant's Motion to Strike, and Defendants' Motion for Summary Judgment at 46-47. Because Johnson was unable to present evidence that Archer was lying, lack of pretext is a clearer ground for affirming the grant of summary judgment on the failure to promote claim.

III.

Johnson next argues that Nordstrom retaliated against her for filing EEOC charges for failure to promote her to beauty director. Her retaliation claim is two-fold: first, Johnson argues that Nordstrom retaliated by failing to promote her to the assistant manager position. Second, she contends that Archer and Irwin mistreated her in retaliation for filing the charges.

The district court dismissed the claim of retaliation based on the failure to promote because, although Johnson had demonstrated a *prima facie* case of retaliation, she could not show that Nordstrom's reasons for not promoting her to assistant manager (lack of team playing and leadership skills and her perception as a "shark") were pretextual. As we have discussed in Part II.B, above, we agree.

The district court next considered Johnson's claim of mistreatment by Irwin and Archer. It concluded that Johnson's claim did not raise allegations "of the severity necessary to be classified as an adverse employment action" and she therefore had failed to establish a *prima facie* case.

To make a *prima facie* case for retaliation, a plaintiff must demonstrate that 1) she engaged in a statutorily protected activity; 2) she suffered an adverse employment action after that activity; and 3) there was a causal link between the adverse action and the protected activity. *Sweeney v. West,* 149 F.3d 550, 555 (7th Cir. 1998). The district court did not elaborate on its finding that the mistreatment could not be classified as an adverse employment action, but, in any event, we can affirm on other grounds. Johnson admitted that Irwin was unaware of Johnson's filing of the EEOC charges, and that therefore her conduct could not have been retaliatory. *See O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1369-70 (7th Cir. 1993); *Causey v. Balog,* 162 F.3d 795, 803-04 (4th Cir. 1998). And it is undisputed that Archer treated Johnson as poorly before her filing of the EEOC charges as he did afterwards. If there was "no ratcheting up of the harassment" after the complaint was filed, the complaint could not have been the cause of the allegedly retaliatory conduct. *See McDonnell v. Cisneros,* 84 F.3d 256, 259 (7th Cir. 1996). Thus, we find that Johnson failed to show that there was a causal link between the adverse action and the protected activity, and we therefore agree with the district court insofar as it found that Johnson failed to make a *prima facie* case.

IV.

Johnson argues that the same conduct that forms the basis of her discrimination and retaliation claims amounts to constructive discharge. Specifically, Johnson alleges that Archer and Irwin "saved stock work" for her and wrongly accused her of stealing customers. Further, she contends, Irwin allowed other employees to falsely accuse her, gave sales leads to other employees and advised other employees

come to work early to do stock work so they would not lose time off the sales floor. Johnson also charges that Archer and Irwin monitored her to determine whether she was, in fact, stealing customers. Johnson claims that these actions, combined with the failure to promote Johnson on account of her race, were so intolerable that she was constructively discharged. But these allegations are a far cry from the conduct needed to support a constructive discharge claim. "To state a claim for constructive discharge, a plaintiff needs to show that her working conditions were so intolerable that a reasonable person would have been compelled to resign." *Chambers v. American Trans Air, Inc.*, 17 F.3d 998, 1005 (7th Cir. 1994) (citing *Henn v. National Geographic Soc.*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 974 (1987)). Such conditions typically include much more egregious allegations than those cited by Johnson. To be actionable, "the conduct at issue must 'have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.'" *Filipovic v. K & R Express Sys., Inc., 176 F.3d 390, 397 (7th Cir. 1999)* (quoting *Saxton v. American Tel. & Tel., Co., 10 F.3d 526, 533 (7th Cir. 1993)).* The actions of Archer and Irwin were not so intolerable as to force her departure.

V.

Last, Johnson takes issue with the district court's striking of several paragraphs of affidavits submitted in support of her allegation of discrimination. We review a district court's decision to strike an affidavit for abuse of discretion. *Clark v. Takata Corp.*, 192 F.3d 750, 760 (7th Cir. 1999) (citing *Buckner v. Sam's Club, Inc.*, 75 F.3d 290,

292 (7th Cir. 1996)).

The district court struck portions of affidavits of Nordstrom employees that may have reflected a racially charged work environment at Nordstrom. For example, one affidavit indicated that an employee was "written up" for allegedly giving preferential treatment to black customers over white customers. Rule 56(e) of the Federal Rules of Civil Procedure provides that affidavits in support of motions for summary judgment must 1) be made with personal knowledge; 2) set forth facts that would be admissible into evidence; and 3) show affirmatively that the affiant is a competent witness. The court struck portions of the affidavits for lack of personal knowledge, as inadmissible hearsay or as conclusory and self-serving.

Johnson argues that the statements were not submitted for the truth of the matters asserted, "but rather to demonstrate that such racist conduct occurred and that racist statements were made." She also contests the court's decision to strike other paragraphs of the affidavits because of "lack of knowledge." Finally, Johnson contests the decision to strike certain portions of the affidavits as conclusory and self-serving.

We need not decide whether the portions of these affidavits were improperly stricken, because--even if they were--their admission would not help Johnson's case. Nordstrom correctly argues that nothing struck from the affidavits would create a material issue on the summary judgment question since the statements were offered to demonstrate a racially hostile environment and Nordstrom's racial animus. They would not be material because:

Liability under Title VII does not turn on the bigotry of company managers unless that bigotry resulted in injury to the plaintiff. A showing of other instances of discrimination in the company may have evidentiary value, but it is not a substitute for a showing of injury to the plaintiff. There therefore needs to be a link between [the] manager's alleged prejudice, and the decisions that [the plaintiff] is challenging.

Chambers, 17 F.3d at 1004 (citation omitted).

The statements Johnson sought to have admitted presumably were for the purpose of providing direct evidence of discrimination on the part of Nordstrom, thus ostensibly obviating the need for Johnson to surmount the obstacles in the path of an indirect showing. But affidavits showing a generally racially charged environment, without more, would not help Johnson's cause.

Johnson also contests the striking of portions of her own affidavit because the district court concluded that they contradicted her deposition testimony. First, the statement that Johnson "was never informed by anyone at Nordstrom that [her] job performance was lacking or needed improvement" was contradicted by her deposition testimony that Irwin confronted her about stealing customers and that Irwin was taking notes on Johnson. Second, the statement that Johnson "never received any verbal or written reprimands for [her] interactions with [her] co-workers" clashed with her testimony that Irwin confronted her about stealing customers. Third, Johnson's statement that "Archer never discussed breaks or overtime with me" was contradicted by her testimony that he did. Johnson offers nothing but a bald assertion that her statements were not contradicted by her testimony, but instead

"supplemented" her testimony. There is no abuse of discretion here. "An affidavit cannot be used to create a genuine issue of material fact where the affidavit differs from prior deposition testimony to the point that it is unreliable." *Patterson v. Chicago Ass'n for Retarded Citizens,* 150 F.3d 719, 720 (7th Cir. 1998).

The district court also struck Johnson's statement as follows: "As a co-worker, I was able to assess Bennett's performance." The court concluded that this statement was also inadmissible because it contradicted Johnson's deposition testimony. In Johnson's testimony, she said she could not compare her *customer service* performance to Bennett's. The deposition testimony is, therefore, limited, and there is no clear contradiction; perhaps there were other aspects of Bennett's performance that Johnson felt she could assess. However, this error is harmless; admission of this statement would not have, and should not have, changed the result.

VI.

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Case No. IP 97-1673-C-Y/G

GAIL B. JOHNSON,
Plaintiff,

v.

NORDSTROM, INC.,
JAMES M. JOHANSSON, and
RICHARD J. ARCHER,
Defendants.

FINAL JUDGMENT

The Court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that the motion for summary judgment submitted by defendants Nordstrom, James M. Johannsson, and Richard J. Archer is **GRANTED** and the court now **ORDERS AND DECREES** that final judgment be entered in favor of the defendants Nordstrom, James M. Johannsson, and Richard Archer and against the plaintiff Gail B. Johnson. This case is now closed.

It is so ordered this 26th day of September 2000.

/s/_____
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Case No. IP 97-1673-C-Y/G

Decided, September 26, 2000

GAIL B. JOHNSON,
Plaintiff,

VS.

NORDSTROM, INC.,
JAMES M. JOHANSSON, and
RICHARD J. ARCHER,
Defendants.

ENTRY ON
PLAINTIFF'S MOTION TO STRIKE,
DEFENDANTS' MOTION TO STRIKE, AND
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Gail M. Johnson ("Johnson") brings this action against the defendants Nordstrom, Inc., James M.

Johansson, and Richard J. Archer ("Nordstrom," "Johansson," and "Archer," respectively), alleging that the defendants subjected her to employment discrimination based on her race, retaliated against her for complaining about her discrimination, and constructively discharged her by making her working conditions intolerable, all in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *etseq.* ("Title VII") and 42 U.S.C. § 1981 *("*§ 1981"). Johnson also alleges the defendants intentionally inflicted emotional distress upon her in violation of Indiana state law. This cause is now before the court on plaintiff's motion to strike, defendants' motion to strike, and defendants' motion for summary judgment. This court, having considered the motions, the parties' arguments, the designated evidence and the applicable law, finds that and the plaintiff's motion to strike should be **denied;** defendants' motion to strike should be **granted** in part and **denied** in part as detailed below; and the defendants' motion for summary judgment should be **granted**.

II. JURISDICTION

This court has jurisdiction over Johnson's claims pursuant to 28 U.S.C. § 1331, 42 U.S.C. §2000e *et seq.* ("Title VII"), 42 U.S.C. § 1981, and supplemental jurisdiction over Johnson's intentional infliction of emotional distress state law claim.

III. UNDISPUTED MATERIAL FACTS FOR SUMMARY JUDGMENT PURPOSES

Facts Concerning the Parties and the Basis for Johnson's Causes of Action

1. Plaintiff Johnson is an African-American female. (Plaintiff's Amended Complaint, ¶ 4).

2. Defendant Nordstrom is a retail department store located in downtown Indianapolis. (Undisputed Material Fact[1], ¶ 1; Gall Aff. ¶ 3).

3. Defendant Johansson, a Caucasian, has been the store manager since Nordstrom opened in Indianapolis in September 1995. (Undisputed Material Fact, ¶ 11; Johansson Dep., at 38).

4. Johnson began working at Nordstrom in September 1995 as a salesperson for the Clinique cosmetic line. (Undisputed Material Fact, ¶ 33; Johnson Dep., at 100, 103, 110).

5. Six months later, Johnson was transferred to the men's fragrance counter as the men's fragrance counter manager. (Undisputed Material Fact, ¶ 34; Johnson Dep., at 111-13,180-81).

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[1] A fact is deemed an "Undisputed Material Fact" for summary judgment purposes based on a review of Plaintiff's Response to Defendants' Statement of Undisputed Facts, Defendant's Reply to Plaintiff's Response, and Plaintiff's Surreply. The numbers given to undisputed material facts correspond with the documents identified in the preceding sentence.

6. Johnson did not have any management/supervisory training responsibilities in either of her positions. (Undisputed Material Fact, ¶ 35; Johnson Dep., at 113; Archer Dep., at 129).

7. Johnson's strength was her selling and she was paid top rate for salespersons in the cosmetics department. (Undisputed Material Fact, ¶ 36-37; Johnson Dep., at 227, 242, 244; Archer Dep., at 96-97, 100, 217).

8. Johnson experienced tension with her co-workers and they perceived her as a "shark" who stole customers. (Undisputed Material Fact, ¶ 44, 45, 50; Johnson Dep., at 133,288; Archer Dep., at 98-99, 131-33; Irwin Dep., at 52-53, 55).

9. Johnson did not observe Nordstrom break policies as she took shorter breaks than required in order to have more time on the selling floor. Taking shorter breaks would put her into unauthorized overtime. (Undisputed Material Fact, ¶ 52; Johnson Dep., at 288; Archer Dep., at 109).

10. Defendant Archer, a Caucasian, was the manager of the Nordstrom cosmetics department from November 1996 to January 1998. (Undisputed Material Fact, ¶ 12; Archer Dep, at 68, 166).

11. Archer discussed Johnson's failure to observe break policies with her. (Undisputed Material Fact, ¶ 53; Johnson Dep., at 288; Archer Dep., at 10912).

12. Archer did not believe Johnson was held in high

regard by her co-workers, that she had rapport with her co-workers, or that she exhibited the type of leadership role that her co-workers could emulate. (Undisputed Material Fact, ¶ 56; Archer Dep., at 138-39; 218).

13. During Archer's tenure as manager, Johansson and Karen Gall ("Gall")(Caucasian), the Human Resources Manager, spoke with Archer numerous times regarding complaints from his staff about his management style. (Undisputed Material Fact, ¶ 14; Johansson Dep., at 76-77, 92-93, 113-14, 127-31; Archer Dep., at 84, 160; Gall Dep., at 83-84, 89-90, 10912).

14. As Archer's immediate supervisor, Johansson specifically coached Archer regarding his management style, commented on it in Archer's written performance evaluation, and after continued complaints, removed Archer from his management position. (Undisputed Material Fact, ¶ 15; Johansson Dep., at 76, 80-81, 102, 125-26, 131-32; Archer Performance Evaluation, Defendants' Tab E2).

15. Johansson noted the following weaknesses in Archer's job performance: lack of leadership, perception of favoritism by employees, unapproachability, complaints of him being unfair, always being receptive instead of proactive, lack of evaluations done for his employees; not teaching, coaching, or empowering his people thus resulting in high turnover. (Undisputed Material Fact, ¶ 225; Johansson Dep., at 102-08).

16. Both Caucasian and African-American employees (ten total, eight Caucasian and two African American) complained, for example, that Archer showed favoritism to certain employees including plaintiff Johnson and Lynette Irwin ("Irwin"). (Undisputed Material Fact, ¶ 17, 19).

17. Both Caucasian and African-American employees complained that Archer would snap or yell at them, treat them rudely, appear unapproachable, and schedule work hours inconsistently. (Undisputed Material Fact, ¶ 18; Johansson Dep., at 92; Gall Dep., at 68, 74, 77-80, 86-88, 90-91, 93-97, 99104, 106).

18. While manager, Archer hired approximately six African-American and Hispanic employees. (Undisputed Material Fact, ¶ 13; Archer Dep., at 74, 80).

19. Nordstrom has no policy of posting job openings or promotional opportunities; the promotion process is deemed to be informal. (Undisputed Material Fact, ¶ 224; Johnson Aff., ¶ 30; Gall Dep., at 42; Johansson Dep., at 147).

20. In February 1997, Johnson sought the beauty director position in the cosmetics department. (Undisputed Material Fact, ¶ 57; Johnson Dep., at 13; Archer Dep., at 122-23).

21. The beauty director position was a non-management position whose primary responsibility was to provide

education, motivational, and technical cosmetics training to clients and department staff. The focus of the position is on training, not selling. (Undisputed Material Fact, ¶ 59; Johnson Dep., at 225; Archer Dep., at 93-94; Nordstrom In-Store Beauty Director Expectations, Defendants' Tab N).

22. Archer was responsible for selecting the beauty director. (Undisputed Material Fact, ¶ 61; Johansson Dep., at 78; Archer Dep., at 92).

23. There were six candidates, including Johnson, for the beauty director position, all of whom Archer interviewed. (Undisputed Material Fact, ¶ 63; Johnson Dep., at 165-66); Archer Dep., at 92-93).

24. At the time Johnson interviewed for the beauty director position, she had six months experience with Nordstrom. (Undisputed Material Fact, ¶ 70).

25. Candidate Deanne Bennett ("Bennett"), a Caucasian, who worked for Nordstrom for three years as a Nordstrom Cosmetic Consultant, was selected for the beauty director position. (Undisputed Material Fact, ¶ 69; Johansson Dep., at 159-60); Archer Dep., at 197; Archer Aff., ¶ 4).

26. Following the announcement of Bennett's promotion, Johnson met with both Archer and Johansson and asked why she had not received the position. (Undisputed Material Fact, ¶ 74; Johnson Dep., at 13-14, 120; Johansson Dep., at 77-78; Archer Dep., 125-26).

27. Johnson asserts that Johansson should have assumed she was complaining about discrimination because (1) she was African American and a white employee had received the promotion she sought and (2) she believed others had complained about her to Archer. (Undisputed Material Fact, ¶ 108; Johnson Dep., at 186-91).

28. On February 18, 1997, Johnson filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that Nordstrom failed to promote her to the beauty director position because of her race. (Undisputed Material Fact, ¶ 76; Johnson Dep., at 11-13; EEOC Charge of Discrimination 240970973, Feb. 18, 1997, Defendants' Tab T).

29. Gall fielded and responded to complaints from Archer's staff regarding his management style and discussed the EEOC charges with Archer before she passed them onto Nordstrom's Risk Management. (Undisputed Material Fact, ¶ 27; Gall Dep., at 26, 32).

30. In April 1997, Archer sought to fill an assistant manager position in the cosmetics department. (Undisputed Material Fact, ¶ 179; Archer Dep., at 51, 53,57,67).

31. Archer selected Lynette Irwin ("Irwin"), a Caucasian, for the assistant manager position. (Undisputed Material Fact, ¶ 128; Irwin Dep., at 17, 3233).

32. Irwin was the cosmetic department's second assistant manager from April 1997 to January 1998. (Undisputed Material Fact, ¶ 28; Irwin Dep., at 17).

33. Prior to her assistant manager position, Irwin worked as a part-time salesperson in both the men's fragrance department and the personal touch department. (Irwin Dep. at 17).

34. After the announcement of Irwin's selection as assistant manager, Johnson filed a second charge of discrimination with the EEOC alleging Nordstrom failed to promote her to the assistant manager's position because of her race and in retaliation for her filing an EEOC charge. (Undisputed Material Fact, ¶ 29; Johnson Aff., ¶ 29; Irwin Dep., at 20; EEOC Charge of Discrimination 240971716, Aug. 7, 1997, Defendants' Tab M).

35. Johnson claims that Irwin's promotion to the assistant manager position was discriminatory because she was more qualified than Irwin for the position since she informally trained Irwin when Irwin first started with Nordstrom. (Undisputed Material Fact, ¶ 110; Johnson Dep., at 35-36, 38-39).

36. On October 7, 1997, Johnson filed a third charge of discrimination with the EEOC alleging that five months earlier, Nordstrom failed to promote her to a fragrance director position because of her race and in retaliation for her filing previous charges. (Undisputed Material Fact, ¶ 92; Johnson Dep., at 34-35; EEOC Charge of Discrimination 240980065, Oct. 7, 1997,

Defendants' Tab U).

37. Nordstrom said there never was a fragrance director position at the Indianapolis store. (Undisputed Material Fact, ¶ 94, Johnson Dep., at 256; Johansson Dep., at 184; Archer Dep., at 169; Irwin Dep., at 47).

38. In May 1997, Nordstrom's Midwest Regional Cosmetic Merchandise Manager had contemplated establishing a fragrance director position in the Indianapolis store. (Undisputed Material Fact, ¶ 95; Johansson Dep., at 86; Irwin Dep., at 34-36).

39. Because the Indiana market was too small to support a separate fragrance director position, the Merchandise Manager decided to simply increase the current responsibilities of one of the management positions in the cosmetics department, specifically, the second assistant manager position held by Irwin. (Undisputed Material Fact, ¶ 96; Johnson Dep., at 258-59; Johansson Dep., at 86-87; Archer Dep., at 169, 202; Gall Dep., at 121; Irwin Dep., at 33-37,47).

40. Irwin's business card read "Assistant Manager/Fragrance Director." (Undisputed Material Fact, ¶ 194; Irwin Dep., at 47).

41. Irwin did not receive any additional compensation or benefits with the added responsibilities. (Undisputed Material Fact, ¶ 97; Archer Dep., at 169; Gall Dep., at 121; Irwin Dep., at 37).

42. Although Johnson did not discuss with either Archer or Johansson her intentions, she resigned from Nordstrom on November 4, 1997, citing stress. (Undisputed Material Fact, ¶ 99; Johnson Dep., at 42, 52, 148-49, 156).

43. In response to Johnson's resignation letter, Nordstrom wrote Johnson a letter which offered her job back, restated Nordstrom's prohibition against discrimination, and reiterated reporting procedures. (Undisputed Material Fact, ¶ 100; Johnson Dep., at 148-50, 153-54; Gall Dep., at 124; Johnson Resignation Letter, Defendants' Tab V; Gall Letter, Defendants' Tab W).

44. Johnson did not respond to Nordstrom's letter. (Undisputed Material Fact, ¶ 101; Johnson Dep., at 41-42, 47, 155; Johansson Dep., at 156).

45. One month after receiving the letter from Nordstrom, in December 1997, Johnson filed a fourth charge of discrimination alleging that she was constructively discharged because of her race and retaliated against for filing previous EEOC charges. (Undisputed Material Fact, ¶ 101; Johnson Dep., at 41-42, 47, 155; Johansson Dep., at 156; EEOC Charge of Discrimination 240980651, Dec. 4, 1997, Defendants' Tab Q).

46. Johnson admits none of the defendants or Irwin ever made discriminatory comments to her. (Undisputed Material Fact, ¶ 103; Johnson Dep., at 205-06).

47. Johnson admits Archer treated Johnson as poorly before her charges as he did after her charges. (Undisputed Material Fact, ¶ 115; Johnson Dep., at 389; Archer Dep., at 207).

48. Johnson also claims that Irwin and Archer acted retaliatory when (1) they once saved stock work for her that could have been completed by her co-workers; (2) Irwin once accused Johnson of stealing customers in front of another employee, Lois Nelson; (3) Irwin once told her that she was making notes and watching everything Johnson did; (4) Irwin once allowed another employee, Kristina Jobe, to falsely blame her for the employee's inability to get her job completed on time; (5) Irwin twice gave sales to other employees while she was in the department; and (6) Irwin told another employee that Johnson no longer worked at Nordstrom. (Undisputed Material Fact, ¶ 116; Johnson Dep., at 355-56, 375-76).

49. Johnson admits that she does not know whether Archer or Johansson intentionally meant to inflict emotional distress. (Undisputed Material Fact, ¶ 131; Johnson Dep., at 204).

50. Kelly Moistner ("Moistner") was employed as assistant manager of cosmetics while Johnson was employed at Nordstrom, and she had the opportunity to observe Johnson. (Undisputed Material Fact, ¶ 168; Moistner Aff., ¶ 13).

51. Moistner testified that at no time did she observe Johnson as a "shark" or stealing other associate's

customers nor did she observe Johnson make complaints about stock work nor refuse to do stock work. (Undisputed Material Fact, ¶¶ 172-73; Moistner Aff., ¶ 5).

Facts Concerning the Nordstrom Environment

52. Hans Prosser ("Prosser"), owner of the modeling agency Blotter Cards, provides fragrance models to various department stores, including Nordstrom. (Undisputed Material Fact, ¶ 132; Prosser Aff., ¶¶ 1-2).

53. Prosser provided two black fragrance models, Gwen Holman (Holman) and Kara Endsley ("Endsley"), to Nordstrom in December 1997. On December 14, 1997, Archer called Prosser to complain about them. Prosser then provided Nordstrom with two white fragrance models and received no complaints from Archer. (Undisputed Material Fact, ¶ 133; Prosser Aff., ¶¶

54. Prosser never had any problems with Holman or complaints about her except from Archer. (Undisputed Material Fact, ¶ 137; Prosser Afl., ¶ 5).

55. Holman was never given a reason why she was no longer being hired to work at Nordstrom. Archer accused her of stealing, but he never filed charges. (Undisputed Material Fact, ¶ 136; Prosser Aff., ¶ 5; Holman Aff., ¶ 10).

56. Since Archer is no longer working at Nordstrom,

Holman has returned working for Nordstrom on a regular basis. (Undisputed Material Fact, ¶ 141; Prosser Aff., ¶ 5; Holman Aff., ¶ 11).

57. The first time Endsley worked at Nordstrom she was sent home because she was wearing a sleeveless dress which was prohibited by the dress code. Archer left a message on Prosser's machine stating that he did not want Endsley returned to Nordstrom because she was not performing. (Undisputed Material Fact, ¶ 143; Prosser Aff., ¶ 6).

58. On the day Archer left the message on Prosser's answering machine, Endsley had sold $280.00 of product prior to being sent home. (Undisputed Material Fact, ¶ 144; Prosser Aff., ¶ 6).

59. Endsley was placed in a competitor's store later that same day and sold nearly the equivalent amount of product. (Undisputed Material Fact, ¶ 145; Prosser Aff., ¶ 6).

60. Patrece Williams ("Williams"), an African American, was employed at Nordstrom as a counter manager in the cosmetics department from August 1995 to February 1997. (Undisputed Material Fact, ¶ 146; Williams Aff., ¶¶ 1-2).

61. Williams testified that there were many times fragrance testers would disappear and Archer made comments such as "The black man that was just in must have taken it" and "Do you see that black man over there? He looks like he's going to steal

something." Williams, however, never heard Archer make the same comments about Caucasian customers. (Undisputed Material Fact, ¶ 159; Williams Aff., ¶ 12).

62. Jennifer Cottman ("Cottman"), an African American, was employed at Nordstrom while Johnson worked there. (Undisputed Material Fact, ¶ 174-75; Cottman Aff., ¶¶ 2-4).

63. Cottman was hired by Archer to be the Trish McEvoy counter manager in the cosmetics department in July 1997. (Undisputed Material Fact, ¶ 75; Cottman Aff., ¶ 4).

64. When Cottman was hired at Nordstrom, no member of Nordstrom management provided her with information regarding promotional procedures in the store. (Undisputed Material Fact, ¶ 177; Cottman Aff., ¶ 6).

65. In January 1998, Cottman knew that the Clinique counter manager position was open. She was interested in the position and wrote Archer a letter asking him to speak with her about the position. Archer never spoke with Cottman about her interest in the Clinique counter position and did not acknowledge receipt of her letter. (Undisputed Material Fact, ¶ 178; Cottman Aff., ¶ 7).

66. Approximately two to three weeks after Cottman wrote the letter to Archer, she contacted Johansson and told him that Archer had never responded to her.

Johansson told her to approach Archer again about the position. Cottman did so but was told by Archer that he did not have time to speak with her. (Undisputed Material Fact, ¶ 179; Cottman Aff., ¶ 8).

67. Archer advised Cottman that she was not qualified for the position due to absenteeism. Cottman reminded Archer that her absences in October 1997 were directly related to injuries she had sustained in a car accident during that time. Cottman did not receive the position. (Undisputed Material Fact, ¶ 181; Cottman Aff., ¶ 9).

68. While working at Nordstrom, Cottman gave facials and make overs as part of her duties. While giving a make over to a black woman, Archer interrupted Cottman and told her she could not tweeze the woman's eyebrows; however, after the incident, Cottman witnessed a white employee tweezing the eyebrows of another white employee. (Undisputed Material Fact, ¶ 183; Cottman Aff., ¶ 11).

69. Cottman was never told to stop tweezing the eyebrows of any white customers. (Undisputed Material Fact, ¶ 184: Cottman Aff., ¶ 11).

70. Laura Dewes ("Dewes"), a light-complected Puerto Rican female, was employed at Nordstrom as a counter manager for eight months and has been in the cosmetic business for ten years. (Undisputed Material Fact, ¶ 191; Dewes Aff., ¶¶ 2-3).

71. One day Dewes was alone at the counter giving a

make-over to a white customer when some black customers walked up. Dewes asked the white customer if it was okay if she quickly helped the black customers. Dewes was written up for giving preferential treatment to black customers over a white customer. (Undisputed Material Fact, ¶ 192; Dewes Aff., ¶ 14).

72. Ruby Harris ("Harris"), an African American, was employed at Nordstrom in the concierge department from September 1995 to March 1996. She believes race discrimination existed at Nordstrom. (Undisputed Material Fact, ¶ 195; Harris Aff., ¶¶ 2-3).

73. Harry Dunn ("Dunn") was an employee at Nordstrom while Johnson was employed. (Undisputed Material Fact, ¶ 203; Dunn Aff., ¶¶ 2-3).

74. During Dunn's employment with Nordstrom he made complaints of race discrimination to Gall and Johansson. (Undisputed Material Fact, ¶ 205-06; Dunn Aff., ¶¶ 7-8).

75. Dunn never received any specific follow-up or feedback from Gall or Johansson to his complaints of race discrimination. (Undisputed Material Fact, ¶ 208; Dunn Aff., ¶ 9).

76. In spring 1997, Archer approached Dunn and advised Dunn that he wanted Dunn to investigate Johnson for commission fraud for not returning merchandise on her own sales number and for stealing customers from other associates. (Undisputed Material Fact, ¶ 209;

Dunn Aff., ¶ 11).

77. When Dunn ask Archer if he had witnessed Johnson commit fraud or steal customers Archer said no. (Undisputed Material Fact, ¶ 210; Dunn Aff., ¶ 11).

78. When Dunn asked Archer for names of other witnesses who had seen Johnson commit commission fraud or steal customers, Archer could not provide any witnesses' names. (Undisputed Material Fact, ¶ 211; Dunn Aff., ¶ 11).

79. When Dunn asked Archer for receipts which supported his allegations that Johnson had committed fraud or stolen customers, he could not supply any receipts. (Undisputed Material Fact, ¶ 212; Dunn Aff., ¶ 11).

80. Based on Archer's inability to substantiate his allegations, Dunn did not investigate Johnson. (Undisputed Material Fact, ¶ 214; D unn Aff., ¶ 11).

81. While Dunn was employed at Nordstrom, Johnson is the only employee whom Archer asked to investigate. (Undisputed Material Fact, ¶ 215; Dunn Aff., ¶ 12).

IV. DISCUSSION

Prior to addressing Defendants' motion for summary judgment, this court will first dispense with preliminary matters concerning both plaintiff's motion to strike and defendants' motion to strike.

A. Motions to Strike

1. Plaintiff's Motion to Strike the Affidavits of Gall & Archer

Plaintiff moved to strike the affidavits of Karen Gall and Richard Archer, arguing that the affidavits constitute sham affidavits contradicting earlier depositions.

According to the sham affidavit rule, a party is prohibited bom using an affidavit to contradict deposition testimony. *See Hinks v. Graco,* No. 91 C 5571, 1993 WL 350193 (N.D. Ill.), at *3 (N.D. Ill.Sept. 3, 1993) (citing 10A WRIGHT, MILLER AND KANE, FEDERAL PRACTICE & PROCEDURE, § 2726 (2d ed. Supp. 1993). However, an affidavit may properly supplement deposition. 10A WRIGHT, MILLER AND KANE, FEDERAL PRACTICE & PROCEDUE, § 2726 (2d ed. Supp. 1993)("While it is clear that a party may not use the vehicle of an affidavit to contradict his deposition testimony he may clarify previous testimony and present additional facts in a subsequently filed affidavit."); *see, e.g., Fash v. Southern Union Co.,* 149 F.2d 885, 892 n.7 (8th Cir. 1998); *Southwest Signs v. INFAX,* 72 F.3d 489, 496 (5th Cir. 1996).

Furthermore, "where a motion to strike is 'too general in that it [does] not specify which part of the ... affidavit should be stricken and why,' the motion *need not be granted." Grady v. Illinois Bell Tel. Co.,* No.94 C 3115, 1996 WL 473657, at * 5 n.5 (N.D. Ill. Aug. 13, 1996) (quoting *Perma Research & Dev. Co. v. Singer Co.,* 410 F.2d 572, 579 (2d Cir. 1969)(italics added); *see also Ernst*

Seidelman Corp. v. Mollison, 10 F.R.D. 426, 428 (S.D. Ohio 1950) (adding that the moving party "must point out in their motion specifically just what language or statements in the ... affidavit they seek to have stricken"). Plaintiff's motion to strike does not specify what parts of the affidavits allegedly alter the earlier deposition testimonies. This court, as detailed below, examined the entirety of both Gall's and Archer's affidavits and depositions and found no alterations or contradictions between either Gall's affidavit and deposition or Archer's affidavit and deposition.

a. Gall's Affidavit and Deposition

In sum, Gall's Affidavit states that on at least two previous occasions, Johnson's immediate supervisor, Lynette Irwin advised Gall of co-workers' complaints that Johnson was stealing customers, and that in response, Gall provided the supervisor with coaching materials indicating how to discuss and resolve sharking issues. (Gall Aff., ¶¶ 4-5).

Gall's deposition does not make reference to the incident described in the affidavit; however, there is no evidence in the deposition that contradicts it. Thus, after a thorough review of Gall's affidavit and deposition, this court finds that the affidavit does not contradict the earlier deposition; rather, it serves to supplement Gall's deposition. Thus, Plaintiff's motion to strike Gall's affidavit is denied.

b. Archer's Affidavit and Deposition

In sum, Archer's affidavit briefly describes his beauty

consultant position and assistant manager position hiring decisions. He states that in February 1997, he interviewed six women for the beauty director position, and he selected Bennet based on her three years experience as a Nordstrom Cosmetics Consultant. Furthermore, he states he selected Lynette for the assistant manager's position and that he did not consider Johnson for two reasons: 1) he did not believe Johnson was interested and 2) he felt she did not exhibit the leadership skills required because she did not get along with co-workers and she did not observe break policies. (Archer Aff. at 2).

In his deposition, Archer likewise states in February 1997, he interviewed for the beauty director position and selected Bennett based on her prior Nordstrom experience. (Archer Dep. at 72, 197). He also states that he selected Irwin to fill the assistant manager position (Archer Dep. at 266); that he was unaware Johnson was interested in the assistant manager position (Archer Dep. at 266); and that he did not select Johnson for a promotion because he felt she needed to work on her teamwork skills (Archer Dep. at 97, 101,109-11,131-34).

The information in the affidavit does not conflict with the deposition. For example, in his deposition, Archer states that one of Johnson's weaknesses is her inability to be a team player. (Archer Dep. at 97, 101, 105, 132-34, 218). He also identifies other weaknesses with Johnson's performance such as developing business (Archer Dep. at 105-06), and not observing break policies (Archer Dep. at 109-12). In addition, he describes how Johnson's position at Nordstrom did not require leadership skills such as managing others or conducting trainings. (Archer Dep. at 129).

After a thorough review of Archer's affidavit and deposition, this court finds that the affidavit does not contradict the earlier deposition; rather, it serves to supplement the deposition. Thus, plaintiff's motion to strike Archer's affidavit is denied.

B. Defendants' Motion to Strike Affidavits Submitted by Plaintiffs

According to Federal Rule of Civil Procedure 56(e), affidavits for summary judgment must comply with the following requirements: (1) be made with personal knowledge, (2) set forth facts that would be admissible into evidence, and (3) show affirmatively that the affiant is competent. FED. R. CIV. R. 56(e).

As stated above, an affidavit may supplement one's deposition testimony; however, an affidavit may not contradict a deposition. *See Hinks v. Graco,* No. 91 C 5571, 1993 WL 350193 (N.D. Ill), at *3 (N.D. I11. Sept. 3, 1993) (citing 10A WRIGHT, MILLER, AND KANE, FEDERAL PRACTICE & PROCEDURE, § 2726 (2d ed. Supp. 1993).

Defendant challenges portions of nine affiants' affidavits; each will be individually addressed below.

1. Jennifer Cottman Affidavit

Defendant challenges portions of ¶¶ 9, 10, and 11 as conclusory and self-serving statements, indications of opinion or belief not based on personal knowledge, and not supported by specific facts. Defendant also challenges a portion of ¶ 11 as inadmissible hearsay.

After reviewing said paragraphs, this court finds as follows:

(1) The phrase, "He went to Mr. Archer and made Mr. Archer speak with me about the Clinique Counter Manager position", is ¶9 is hereby stricken because the affiant lacks personal knowledge.

(2) The entirety of ¶ 10 is hereby stricken because the affiant lacks personal knowledge of its contents.

(3) The phrase, "The white employees were not told to stop", in ¶ 11 is hereby stricken because the affiant lacks personal knowledge.

All other phrases within ¶¶ 9 and 11 not specifically identified above are deemed admissible.

2. Laura Dewes Affidavit

Defendant challenges portions of ¶ 1 4 and ¶¶ 5, 6, 7, 8, 9, 10, 11, and 12 as conclusory and self-serving statements, indications of opinion or belief not based on personal knowledge and not supported by specific facts. Defendant also challenges ¶¶ 4 and 10 as inadmissible hearsay.

After reviewing said paragraphs, this court finds as follows:

(1) The phrase, "and she said it was okay", in ¶ 4 is hereby stricken because it qualifies as

inadmissible hearsay.

(2) The entirety of ¶ 5 is hereby stricken because the affiant lacks personal knowledge of its contents.

(3) The entirety of ¶ 6 is hereby stricken because the affiant lacks personal knowledge of its contents.

(4) The phrase, "However, when black employees of Nordstrom were late to work, they would get written up", in ¶ 7 is hereby stricken because the affiant lacks personal knowledge.

(5) The entirety of ¶ 8 is hereby stricken because the affiant lacks personal knowledge of its contents.

(6) The entirety of ¶ 9 is hereby stricken because the affiant lacks personal knowledge of its contents.

(7) The entirety of ¶ 10 is hereby stricken because the affiant lacks personal knowledge of its contents.

(8) The entirety of ¶ 12 is hereby stricken because it is a conclusory and self-serving statement.

All other phrases and paragraphs not specifically identified above are deemed admissible.

3. Harry Dunn Affidavit

Defendant challenges ¶¶ 6, 8, and 10 as conclusory and self-serving statements, indications of opinion or belief, not based on personal knowledge, and not supported by specific facts. Defendant also challenges ¶ 7 as inadmissible hearsay.

After reviewing said paragraphs, this court finds as follows:

(1) The entirety of ¶ 6 is hereby stricken because the affiant lacks personal knowledge as to whether or not discrimination training did or did not occur during his orientation.

(2) The phrase, "[Ms. Gall] would merely ask me if I had spoken to J.J. Johansson or my department managers and tell ne she would get back with me", in ¶ 7 is hereby stricken because it is inadmissible hearsay.

All other phrases and paragraphs not specifically identified above are deemed admissible.

4. Ruby Harris Affidavit

Defendant challenges ¶¶ 4, 5, 6, 7, and 13 as conclusory and self-serving statements, indications of opinion or belief, not based on personal knowledge, and not supported by specific facts.

After reviewing said paragraphs, this court rules as

follows:

(1) The phrase, "While an employee of Nordstrom, I was told that black customers frequently were followed by security personnel", in ¶ 4 is hereby stricken because it is based on hearsay.

(2) The entirety of ¶ 5 is hereby stricken because the affidavit does not establish how the affiant, as an employee of the concierge department, would have personal knowledge of the security camera set up.

(3) The phrase, "If there was a store theft, it was always the black security guards that were told to chase after them", in ¶ 6 is hereby stricken because it is based on hearsay and the affiant does not indicate in her affidavit that she had personal knowledge of such incidents.

(4) The phrase, "I was very qualified for each position, but was never given an opportunity to even interview for any of the positions", in ¶ 7 is hereby stricken because it is a conclusory and self-serving statement.

(5) The phrase, "Tom and I were discussing [the O.J. Simpson trial] and Tom made the remark that 'niggers just do stuff like that'", in ¶ 8 is hereby stricken because it is based on hearsay as Tom is not a party to this case.

(6) The phrase, "Tom called me a 'nigger bitch'", in ¶ 9 is hereby stricken because it is hearsay. The rest of the paragraph is admissible; however, because it falls within the statement of a party opponent exception to the hearsay rule as the statements were allegedly said by defendant Johansson.

(7) The phrases, "A black artist by the name of Pat Gaines brought in her paintings for the display and asked Nordstrom for lights and easels. Nordstrom told her it was a problem to take care of. However, when a white artist came in to display his paintings, Nordstrom was very accommodating to him and provided him with lights, easels, and anything else he needed", in ¶ 11 are hereby stricken because the affidavit does not indicate how the affiant had personal knowledge of the alleged incidents.

(8) The entirety of ¶ 13 is hereby stricken because it contains conclusory and self-serving statements.

All other phrases not specifically identified above are deemed admissible.

5. Gwen Holman Affidavit

Defendant challenges portions of ¶¶ 7 and 11 and the entirety of ¶¶ 8 and 10 as conclusory and self-serving statements, indications of opinion or belief, not based on personal

knowledge, and not supported by specific facts.

After reviewing said paragraphs, this court rules as follows:

(1) The phrases, "Someone from Nordstrom had to have called the account executive to let her know that I was there. She would not have just called out of the blue asking me to leave", in ¶ 7 are hereby stricken because the affiant lacks personal knowledge as to how her account executive knew she was working at Nordstrom.

(2) The entirety of ¶ 8 is hereby stricken because it consists of conclusory and self-serving statements.

(3) The phrase, "I get complimented by Nordstrom employees of what a good job I am doing", in ¶ 11 is hereby stricken because it is conclusory and self serving.

All other phrases and paragraphs not specifically identified above are deemed admissible.

6. Gall Johnson Affidavit

Defendant challenges ¶¶ 6, 8, 10, 11, 14, 19, 20, 22, 24, 27, 29, and 32 as conclusory and self-serving statements, indications of opinion or belief, not based on personal knowledge, and not supported by specific facts. Defendant also challenges ¶ 31 as inadmissible hearsay.

In addition, defendant objects to the following portions of Johnson's affidavit testimony on the basis that it is contradicted by her previous deposition:

Paragraph of Affidavit That Defendant Alleges Contradicts Deposition	Corresponding Page Cite To Deposition That Defendant Alleges Contradicts Affidavit
¶ 10	Pages 117-18
¶ 13	Pages 43-45, 50-51
¶ 15	Pages 43-45, 50-51
¶ 17	Pages 50-51
¶ 21	Page 228
¶ 28	Page 225

The court will first address the paragraphs that defendant challenges as conclusory and self-serving statements, indications of opinion or belief, not based on personal knowledge, and not supported by specific facts. Then, this court will discuss the parts of Johnson's affidavit that are to be stricken because they allegedly alter her deposition testimony.

First, after reviewing ¶¶ 6, 8, 10, 11, 14, 19, 20, 22, 24, 27, 29, and 32 this court finds that:

(1) The entirety of ¶22 is hereby stricken because it is conclusory and self serving.

(2) The phrase, "I possessed more cosmetic knowledge and experience than Bennet", in ¶ 127 is hereby stricken because the affiant lacks personal knowledge as to Bennet's cosmetology background.

All other phrases and paragraphs not specifically identified above are deemed admissible.

Second, this court, having thoroughly compared Johnson's affidavit to her deposition, grants in part and denies in part defendants' motion to strike as detailed below.

Johnson's statement in ¶ 10 that "[she] complained to Gall about a 'day off' because Archer gave the requested 'day' off to [her] white co-worker who did not request the day off" is not in direct conflict with her deposition testimony. In her deposition, Johnson states, "whenever I requested time off, Mr. Archer refused to give it to me. When I scheduled-I made out the schedule, myself two days in a row, Mr. Archer took the schedule and changed it." (Johnson Dep. at 117). The court finds that Johnson's affidavit statement supplements her deposition; therefore, defendants' motion to strike ¶ 10 is **denied.**

Johnson's statement in ¶ 13 that she "was never informed by anyone at Nordstrom that my job performance was lacking or needed improvement" directly contradicts Johnson's deposition testimony that Irwin confronted her about stealing customers and that Irwin was taking notes on Johnson (Johnson Dep. at 50-51). Thus, ¶ 13 of Johnson's affidavit is hereby stricken.

Johnson's statement in ¶ 15 that she "never received any verbal or written reprimands for [her] interactions with [her] co-workers is likewise contradicted by her deposition testimony that Irwin confronted her about stealing customers. Thus, ¶ 15 of Johnson's affidavit is hereby stricken.

Johnson's statement in ¶ 17 that "[d]uring [her] employment at Nordstrom [she] was never disciplined or counseled about being a 'shark'" is not contradicted by Defendants' cited deposition testimony. In her deposition, Johnson alleged Irwin falsely accused her of stealing customers. (Johnson Dep. at 50). Her deposition does not include any information about being disciplined or counseled; thus, her affidavit supplements her deposition, and Defendants' motion to strike ¶ 17 is denied.

Johnson's statement in ¶ 21 that "Archer never discussed breaks or overtime with [her]" is directly contradicted by her deposition testimony. Her deposition reads as follows:

> A. When Mr. Archer and I had a discussion about the tension within the department and he told me the reason for that was because I took 30-minute lunch breaks, I took half-hour lunch breaks instead of hourly lunch breaks, and that put me into overtime.
> Q. Okay. And so he spoke with you to take your full hour?
> A. Yes.
> Q. And, in fact, I believe you testified earlier that the other employees in the department were kind of upset over that?
> A. Yes.

(Johnson Dep. at 288). Thus, ¶ 21 of Johnson's affidavit is hereby stricken.

Johnson's statement in ¶ 28 that "[a]s a co-worker, [she] was able to assess Bennett's performance" is contradicted by her deposition testimony. In her deposition, Johnson admitted she was unable to assess Bennett's customer service performance. Johnson's deposition reads as follows:

> A. My performance was better than Ms. Bennett's in that I-I was the top salesperson.
> Q. So you're indicating with respect to performance only in the sales area?
> A. No. I-I can't compare my customer service to her, but I had good customer service also.
> Q. Okay. But like you said, you couldn't compare it to her?
> A. No, because I didn't know what kind of documentation or anything that she'd ever received.

(Johnson Dep. at 225-26). Since Bennet received the beauty director position, a position where the candidate's previous sales performance was not considered, Johnson's assessment she had top sales is irrelevant. Johnson admits she was unable to assess Bennett's customer service abilities; thus, ¶ 28 of Johnson's affidavit is hereby stricken.

7. Hans Prosser Affidavit

Defendant challenges ¶ 5 and a portion of ¶ 6 as conclusory and self-serving statements, indications of opinion or belief, not based on personal knowledge, and not supported by specific facts. Defendant also challenges a portion of ¶ 5

as inadmissible hearsay.

After reviewing said paragraphs, the phrase, "no reprimand or complaint was ever given to Gwen by anyone at Nordstrom", in ¶ 5 is hereby stricken because the affiant lacks personal knowledge as to whether Nordstrom disciplined Gwen Holman. All other phrases and paragraphs not specifically identified above are deemed admissible.

8. Patrece Williams Affidavit

Defendant challenges a portion of ¶ 6 and ¶¶ 7, 9, 10, 11, 12, 13, 14, 15, 16, 18, and 19 as conclusory and self-serving statements, indications of opinion or belief, not based on personal knowledge, and not supported by specific facts. Defendant also challenges portions of ¶¶ 6, 8, 9, 13, 14, 15, 17, and 18 as inadmissible hearsay.

After reviewing said paragraphs, this court rules as follows:

(1) The entirety of ¶ 13 is hereby stricken because the affidavit does not indicate that the affiant had personal knowledge of the alleged reprimands.

(2) The phrase, "However, when Constance Hunter's aunt had surgery and Constance wanted to stay home with her, she did not need a doctor's note", in ¶ 14 is hereby stricken because the affiant lacks personal knowledge.

(3) The entirety of ¶ 17 is hereby stricken because it is based on hearsay.

(4) The phrase, "Bill Nordstrom told me to 'work through it'", in ¶ 18 is hereby stricken because it is hearsay as Bill Nordstrom is not named as a defendant.

(5) The entirety of ¶ 19 is hereby stricken as it is conclusory and self serving. All other phrases and paragraphs not specifically identified above are deemed admissible.

9. William Ivers' Affidavit Exhibits

Attached to Ivers' affidavit are four position statements drafted by Defendants' attorney Ivers, and submitted to the EEOC. These attachments are not hearsay because they contain statements made by Defendants' attorney in a representative capacity for the Defendants' and therefore they fall under the hearsay exception 801(2)(C) of the Federal Rules of Evidence. Thus, the exhibits are admissible and Defendants' motion to strike the exhibits attached to Ivers' affidavit is denied.

C. Motion for Summary Judgment

1. Summary Judgment Standard

Pursuant to Trial Rule 56(c), a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. Civ. P. 56(c). The record and all reasonable inferences therefrom must be

viewed in the light most favorable to the non-moving party. *National Soffit & Escutcheons, Inc. v. Superior Sys. Inc.*, 98 F.3d 262, 264 (7th Cir. 1996).

The moving party bears the burden of demonstrating the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317,323 (1986). The burden may be met by demonstrating "that there is an absence of evidence to support the non-moving party' s case." *Celotex Corp.*, 477 U.S. at 325. If the moving party meets its burden, the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading," but must present specific facts to show that there is a genuine issue of material fact. FED. R. Civ P. 56(e); *see also National Soffit*, 98 F.3d at 265 (citing *Hughes v. Joliet Correctional Ctr.*, 931 F.2d 425,428 (7th Cir. 1991)).

In the context of employment discrimination cases, the court applies the summary judgment standard with added rigor "where intent and credibility are crucial issues", *Perdomo v. Browner*, 67 F.3d 140, 144 (7th Cir. 1995), keeping in mind that the non-moving party is not merely pointing to self-serving allegations with no evidentiary support. *Cliff v. Board of Sch. Comm 'rs*, 42 F.3d 403,408 (7th Cir. 1994). "Summary judgment is appropriate only where plaintiffs put forward no evidence tending to establish discriminatory intent or where defendants successfully establish a nondiscriminatory, nonpretextual reasons for their actions." *Baltzer v. City of Prairie/Police Dep 't*, 725 F. Supp. 1008, 1024 (W.D. Wisc. 1989).

2. Count 1: Title VII Failure to Promote

To establish a prima facie case of race discrimination in a failure to promote context, the plaintiff must show four factors: (1) she is a member of a protected group; (2) she was qualified for the position sought; (3) she was rejected for the position; and (4) the employee promoted was not a member of the protected group and *was not more qualified* than plaintiff. *Payne v. Milwaukee County,* 146 F.3d 430,434 (7th Cir. 1998)(citing *Brill v. Lante Corp.,* 119 F.3d 1266, 1270 (7th Cir. 1997)(italics added)). In cases where the employer does not follow a formal system of posting job openings and taking applications, a plaintiff need only show that she would have applied for the position had she been aware there was an opening.[2] *Baltzer v. City of Prairie/Police Dep 't,* 725 F. Supp. 1008, 1024 (W.D. Wisc. 1989).

When evaluating whether a candidate is qualified, "[a]n employer may select the qualifications it considers necessary for a promotion. *Gonzalaz v. City of Gary,* No. 99-4185, 2000 WL 1047523, at *3 (July 27, 2000)(citing *Brill v. Lante Corp.*, 119 F.3d 1266, 1271 (7th Cir. 1997) (an employer may have a preference for a "quick study" or other criteria so long as nondiscriminatory)). "The rationale for this rule is that courts do not sit as super-personnel boards overseeing employer's business decisions." *Id.* "If the

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[2] Though the parties dispute whether Johnson did in fact apply for the assistant manager position, this court assumes for purposes of the summary judgment motion that Johnson did apply for the assistant manager position because: (I) Nordstrom followed an informal promotion process and (2) the facts must be viewed in the light most favorable to the non-moving party.

plaintiff was not qualified for any reason, then she falls short of establishing a prima facie case and there is no inference of discrimination." *Pafford v. Herman,* 148 F.3d 658,669 (7th Cir. 1998).

Once plaintiff establishes a prima facie case, there is a rebuttable presumption of discrimination and the employer bears the burden of offering a legitimate, nondiscriminatory reason for the employment action. *Id.* at 433 (citing *Texas Dep 't of Community Affairs v. Burdine,* 101 S. Ct. 1089, 1308-09 (1981)). If defendant fails to present a "legitimate, nondiscriminatory reason" for its treatment of plaintiff, judgment must be entered for the plaintiff. But, if the defendant presents a legitimate nondiscriminatory reason for its action, the burden reshifts to plaintiff to present evidence that demonstrates the pretextual nature of the defendants' articulated reason. *See id.*

In Count I of her Amended Complaint, Johnson alleges that Nordstrom, through actions of its employees, discriminated against her in violation of Title VII by failing to promote her to the following positions based on her race: (1) fragrance director position, (2) the assistant manager position, and (3) the beauty director position. Each position will be analyzed for summary judgment purposes.

a. The Fragrance Director Position

Johnson concedes to summary judgment on all claims involving the fragrance director position (Plaintiff's Memorandum in Opposition to Summary Judgment, at 7 n.4) since no such position exists. Accordingly, summary

judgment is granted in favor of all defendants on all claims-Count I, Title VII race discrimination; Count II, Title VII retaliation; Count III, § 1981; and Count IV, intentional infliction of emotional distress-arising from defendants' failure to promote Johnson to the position of fragrance director.

b. The Beauty Director Position

Johnson has met her burden on the first and third prongs of the prima facie case: she is African-American and she was not promoted to the assistant manager position. Therefore, the issues remaining are: (1) whether Johnson was qualified for the position of beauty director and (2) whether Bennett, the Caucasian employee who was promoted to the assistant manager position, was not more qualified than Johnson.

In order to address whether Johnson was qualified for the beauty director position, it is necessary to examine the responsibilities of the position. The beauty director position primarily consists of training treatment staff regarding hygiene, color theory, skin profiling, and related topics; directing the Nordstrom Make-up Artistry Team; tracking and overseeing promotional events; and providing general support staff with any treatment and/or color questions or concerns. (Cosmetic Department Beauty Director Job Description, Defendants' Exhibit 367, Defendants' Tab O; *see also* Nordstrom In Store Beauty Director Expectations, Plaintiffs' Exhibit 2, Defendants' Tab N). The focus of the position is on training rather than sales. (Johnson Dep. at 225; Archer Dep. at 177)

The undisputed facts indicate that Johnson was not qualified for the beauty director position. First, Johnson admits that during her interview, when Johnson was asked what she felt the most important part of the job would be, Johnson responded "sales." (Plaintiff's Response to Defendants' Statement of Undisputed Material Facts, 18, Fact 71). Second, the position involves training and interacting with co-workers, and Johnson admits she experienced tension with her co-workers. (Johnson Dep. at 133; *see also* Archer Dep. at 97). A genuine issue of material fact exists as to whether Johnson was in fact a shark; however, the undisputed facts indicate that Johnson's co-workers perceived her as a shark (Archer Dep. at 132-33; Irwin Dep. at 52; Gall Aff. ¶ 4-5), and that generated much of the tension. In her deposition, Johnson testified that co-workers confronted her about "stealing customers." (Johnson Dep. at 50-51). Third, Johnson did not observe several of the Nordstrom work policies. Johnson stated in her deposition that Archer confronted her about not following Nordstrom's break policy; Johnson was not taking sufficient breaks and, therefore, was going into unauthorized overtime hours. He specifically informed her that the fact she took half-hour lunch breaks instead of hour-long lunch breaks caused tension within the department. (Johnson Dep. at 288; *see also* Archer Dep. at, 109-12). In addition, Johnson had received written notification that she failed to follow the check policy. (Johnson Dep. at 90). For the above reasons, the court finds that Johnson was not qualified for the promotion.

Since the court finds that Johnson was not qualified, it need not reach the merits of whether Bennet was not more qualified for the position. However, even if this court determined Johnson was qualified, Johnson fails to prove that

Bennett was not more qualified. As noted earlier, Johnson conceded that she would be unable to compare her customer service abilities to Bennett's abilities because she was unaware of what types of documentation Bennett received. (Johnson Dep. at 225-26).

Plaintiff did not establish her prima facie case; thus, the court **grants** summary judgment in favor of all defendants on all claims-Count I, Title VII race discrimination; Count II, Title VII retaliation; Count III, § 1981; and Count IV, intentional infliction of emotional distress-arising from the defendants' failure to promote Johnson to the position of beauty director.

c. The Assistant Manager Position

As with the beauty director position, Johnson has met her burden on the first and third prongs of the prima facie case: she is African-American and she was not promoted to the assistant manager position. Therefore, the issues remaining are: (1) whether Johnson was qualified for the position of assistant manager and (2) whether, Irwin, the employee who was promoted to the assistant manager position, was not more qualified than Johnson.

First, in regard to whether Johnson was qualified, Johnson has presented evidence that creates a genuine issue of material fact; therefore, she has met her burden under the second prong of the prima facie case. Nordstrom contends that Johnson failed to meet the assistant manager qualifications since she was a "shark," created tension between herself and co-workers, did not utilize her breaks

properly, did not regularly perform stock work, did not develop her business, and did not meet monthly goals set for each of the fragrance lines. Johnson, through her testimony and the testimony of her former supervisor Moistner, (Moistner Aff. at 1), presented evidence conflicting with Nordstrom's allegations by showing Johnson was not a shark, properly utilized her breaks, and regularly performed stock work. But, in order to make a prima facie case, Johnson must show that she established all four prongs.

In regard to whether Irwin was not more qualified than Johnson, Johnson fails to provide sufficient evidence to meet her burden under the fourth prong. Johnson argues that Irwin was not more qualified because: (1) Irwin was only a part-time employee and Johnson had more years experience, (2) Gall, Head of Human Resources, was concerned about Irwin's qualifications for the job, and (3) Archer exhibited favoritism toward Irwin.

First, Archer stated that being a team player and possessing leadership skills were essential for the assistant manager. (Archer Dep. at 71,187-88; Archer Aff. ¶ 5). Archer believed Irwin possessed these skills while he believed Johnson did not. (Archer Dep. at 187-88). Although Irwin had less experience/seniority as a Nordstrom employee, Irwin served as Johnson's supervisor prior to her promotion to assistant manager; therefore, Irwin had management experience within Nordstrom. (Archer Dep. at 103). Johnson admitted that her Nordstrom positions did not provide her with management or supervisory experience. (Johnson Dep. at 113).

Second, though Johnson argues Gall was concerned

about Irwin's qualifications, no where does Gall testify that Irwin was less qualified than Johnson. In Gall's deposition, when asked about Johnson, Gall responded, "I don't have much of an opinion because I never really talked to Gail [Johnson]." (Gall Dep. at 146). Further, when asked who would be most knowledgeable of Johnson's work performance, Johnson answered, "The co-workers and manager." (Gall Dep. at 146). These answers indicate that Gall would not have any basis of comparison between Johnson and Gall and, therefore, she could not indicate if Irwin was less qualified. When asked what Gall thought of Irwin being promoted, she responded, "Just that-not knowing much about her performance, being that I didn't work with her, I didn't feel that she had been in the position long enough to become assistant." (Gall Dep. at 149). Her concern about Irwin's length of time at Nordstrom's was Gall's only concern regarding Irwin being promoted to assistant manager. (Gall Dep. at 149).

Third, while it may seem unfair that a supervisor exhibits favoritism toward certain employees, such an assertion cannot be the basis of a Title VII race-related complaint. As long as the employer can provide a legitimate reason why it chose one candidate over another, the employer has satisfied its burden. According to the law, "Title VII and the equal protection clause prohibit employment discrimination on the basis of sex [and race]. They do not prohibit discrimination on the basis of personal favoritism, grudges, or other arguably unfair or improper motives." *Baltzer v. City of Prairie/Police Dep 't,* 725 F. Supp. 1008, 1022 (W.D. Wisc. 1989).

Johnson fails to provide sufficient evidence that Irwin

was not more qualified than Johnson for the assistant manager position; thus, she cannot establish a prima facie case. Defendants' motion for summary judgment as to Johnson's Title VII race discrimination as to the assistant manager position is hereby granted.

3. Count II: Title VII Retaliation & Constructive Discharge

Under Title VII § 704, it is unlawful for "an employer to discriminate against any of its employees... because [s]he has opposed any practice made lawfully by [Title VII] or because [s]he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, the plaintiff must show that: (1) she engaged in protected activity; (2) the defendants took an adverse employment action against her; and (3) there is a causal link between her protected activity and the adverse action. *Gleason v. Mesirow Fin. Inc.*, 118 F.3d 1134 (7th Cir. 1997); *Motley v. Tractor Supply Co.*, 32 F. Supp.2d 1026, 1037 (S.D. Ind. 1998).

In regard to prong two, the alleged adverse employment actions must be material. The Seventh Circuit defines "material" as "more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th

Cir. 1993).

In regard to prong three, to establish a causal link, plaintiff must "proffer evidence 'sufficient to raise [an] inference that the protected activity was the likely reason for the adverse action.'" *Davis v. University of Chicago Hosp.*, No. 93 C 5324, 1996 WL 66120, at *7 (N.D. Ill. Feb. 12, 1996)(quoting *Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990). "It is possible to infer a causal link between the alleged protected activity and the discharge where the discharge follows 'on the heels' of the protected activity and where it is reasonable to infer that the person making the discharge decision had knowledge of the activity." *Davis v. University of Chicago Hosp.*, No. 93 C 5324, 1996 WL 66120, at *7 (N.D. Ilk Feb. 12, 1996) (citing *Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994)).

A "substantial time lapse between the protected activity and the adverse employment action 'is counter-evidence of any causal connection.'" *McKee v. Ball State Univ. Bd. of Trustees*, No. IP 99-0093 C T/G, 2000 WL 988518, at *6 (S.D. Ind. July 14, 2000)(quoting *Johnson v. Univ. of Wisconsin-Eau Claire*, 70 F.3d 469, 480 (7th Cir. 1995). "Though the court has stated that a temporal sequence is telling only when an adverse action follows 'fairly soon' after the protected expression *(McKee v. Ball State Univ. Bd. of Trustees*, No. IP 99-0093 C T/G, 2000 WL 988518, at *6 (S.D. Ind. July 14, 2000)(quoting *Sweeney v. West*, 149 F.3d 550, 557 (7th Cir. 1998)), it has not clarified what constitutes 'fairly soon.' Rather, the court has stated that causation was established when only a day or a week passes between the protected expression and the adverse action *(McKee v. Ball*

State Univ. Bd. of Trustees, No. IP 99-0093 C T/G, 2000 WL 988518, at *6 (S.D. Ind. July 14, 2000)(citing *McClendon v. Indiana Sugars, Inc.,* 108 F.3d 789, 797 (7th Cir. 1997)). "But[, the court] has also expressed concern that a gap of a month between the two events would not alone support a prima facie case." *McKee v. Ball State Univ. Bd. of Trustees,* No. IP 99-0093 C T/G, 2000 WL 988518, at *6 (S.D. Ind. July 14, 2000)(citing *Eiland v. Trinity Hosp.,* 150 F.3d 747,753 (7th Cir. 1998)(additional citations omitted). Courts have found that a causal connection is established if only two months pass between the EEOC complaint and the adverse job action (*Roney v. Illinois Dep 't of Trans.,* No. 95C4240, 1997 WL 94718, at *7 (N.D. Ilk Mar. 3, 1997)(citing *Shirley v. Chrysler First, Inc.,* 970 F.2d 39, 42-43 (5th Cir. 1992)(two months between EEOC complaint and adverse job action sufficient to create factual issue as to causation)), but if three or more months pass, there is no temporal connection between the complaint and employment action. *See, e.g., Filiprovic v. K & R Express Sys., Inc.,* 176 F.3d 390, 399 (7th Cir. 1999) (four month gap severed causation); *Parkins v. Civil Constructors of Ill., Inc.,* 163 F.3d 1027, 1038 (7th Cir. 1998) (three months between complaint and lay off is insufficient); *Hughes v. Derwinski,* 967 F.2d 1168, 1174-75 (7th Cir. 1992) (four month gap severed causation).

As when making a discrimination case, plaintiff bears the burden of establishing her prima facie case. If the prima facie case is established, the burden shifts to the defendant to present a legitimate nondiscriminatory reason for the employment action. If the defendant is able to do so, then the burden reshifts to plaintiff to make a showing that defendants reason is pretextual. 1998). *Eiland v. Trinity Hosp.,* 150 F.3d 747,753 (7th Cir. 1998).

Here, Johnson made three charges of discrimination while employed by Nordstrom. Each charge was filed on the basis of race discrimination and the second and third charges were filed on the basis of retaliation as well; thus, Johnson engaged in a protected activity and, therefore, she has satisfied the first prong. The only issues then are whether Johnson met the second and third prongs of a prima facie case. This court will address these issues in regard to each of her retaliation claims set forth below.

a. Retaliation Claim as to the Fragrance Director Position

As stated above the defendants' motion for summary judgment is granted in regard to all of Johnson's claims as to the fragrance director position, including her retaliation claim, as there was no such position to which Johnson could have been promoted. Thus, this court need not articulate further analysis on this issue.

b. Retaliation Claim as to the Assistant Manager Position

Johnson has established the second prong as she alleges that she was not promoted because she had previously filed EEOC charges. Not being promoted does in fact constitute materially adverse employment action. *Massey v. Zema Sys. Corp.*, No. 95 C 3504, 1998 WL 708913, at*10 (N.D. I11. Sept. 30, 1998).

The issue then is whether Johnson satisfied the third prong of her prima facie case by making a causal connection between the adverse action and protected expression. As

stated above, two months between an EEOC complaint and adverse job action is sufficient to create a factual issue as to causation. *See, e.g., Roney v. Illinois Dep 't of Trans.,* No. 95C4240, 1997 WL 94718, at *7 (N.D. I11. Mar. 3, 1997). Johnson first filed with the EEOC in February 1997, and she applied and was turned down for the assistant manager position in April 1997, approximately two months later. Thus, this court finds that there is a genuine issue of material fact as to whether a causal connection was established; thus, the third prong has been met.

Since Johnson has met the elements of her prima facie case for her retaliation claim as to the assistant manager position, the burden shifts to Nordstrom to provide a legitimate, nondiscriminatory reason for not promoting her to assistant manager. Nordstrom indicated, through the testimony of Archer, that Johnson was not promoted because she lacked the requisite team playing and leadership skills because she was perceived as a shark among her co-workers. Johnson admitted she experienced tension with her co-workers.

As Nordstrom has provided a legitimate, nondiscriminatory reason for not promoting Johnson, the burden reshifts to Johnson to establish that Nordstrom's legitimate, nondiscriminatory reason is pretextual.

Johnson has failed to provide sufficient evidence which would lend a reasonable jury to possibly conclude that the reasons stated by Nordstrom to not promote Johnson were pretextual; Johnson provides no evidence that her not being promoted was a result of her making EEOC charges. In her brief, she attempts to establish retaliation by citing alleged

incidents to support racial animus. (Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, at 32-33).

However, "[t]o show pretext, [plaintiff] must establish that the [defendants'] legitimate nondiscriminatory reasons for the adverse actions are 'unworthy of credence, thus raising the inference that the real reason is discriminatory [or retaliatory].'" *Sedwick v. West,* 92 F. Supp.2d 813,819 (S.D. Ind. 2000) (quoting *Essex v. United Parcel Serv.,* 111 F.3 d 1304, 1309 (7th Cir. 1997)). "That the [defendants] may have been mistaken or made a poor business decision does not demonstrate pretext." *Id.* To demonstrate pretext, plaintiff must show "that the defendant did not honestly believe in its stated reason." *Id.* (citing *Sweeney v. West,* 149 F.3d 550, 557 (7th Cir. 1998)). In other words, "a plaintiff must produce evidence that 'amply' supports the claim that the employer's proffered reasons are 'unworthy of credence.'" *Id.* (quoting *Giannopoulos v. Brach & Brock Confections, Inc.,* 109 F.3d 406, 411 (7th Cir. 1997)).

Johnson has not met her burden. The reason Nordstrom did not promote Johnson was not because she filed EEOC charges but because the court finds that Nordstrom, through manager Archer, honestly believed that she did not possess leadership skills required for a management position because, as Johnson admits, she was perceived as a "shark" by coworkers and experienced tension with coworkers. (Undisputed Material Fact ¶¶ 44, 45, 50; Johnson Dep., at 133,288; Archer Dep., at 98-99, 131-33; Irwin Dep., at 52-53, 55). It does not matter whether Johnson actually was a "shark," but that coworkers perceived her as such so it undermined her management authority.

As there is ample evidence to support the claim that Nordstrom's reasons are worthy of credence, *Sedwick,* 92 F. Supp.2d at 819, defendants' motion for summary judgment is **granted** in regard to Johnson's retaliation claim as to the assistant manager position.

c. Retaliation Claim as to Irwin and Archer's Conduct

Johnson alleges that Irwin's and Archer's conduct constituted retaliation.

Specifically, Johnson alleges:

> (1) they once saved stock work for her that could have been completed by her co-workers; (2) Irwin once accused her of stealing customers in front of another employee; (3) Irwin once told her that she was making notes and watching everything she did; (4) Irwin once allowed another employee, Kristina Jobe, to falsely blame her for the employee's inability to get her job completed on time; (5) Irwin twice gave sales to other employees while Johnson was in the department; and (6) Irwin told another employee that Johnson no longer worked at Nordstrom.

(EEOC Charge of Discrimination 240980651, Dec. 4, 1997).

Assuming Johnson established the first and third prongs of a prima facie case, "[n]o actionable claim for retaliation or discrimination will lie unless the plaintiff has

suffered some adverse employment action." *See Ribando v. United Airlines, Inc.*, 200 F.3d 507, 511 (7th Cir. 1999)(citing *Cheek v. Peabody Coal* Co., 97 F.3d 200,204 (7th Cir. 1996); *Smart v. Ball State Univ.*, 89 F.3d 437,440 (7th Cir. 1996)). Johnson's allegations of how Irwin and Archer treated her are not of the severity necessary to be classified as an adverse employment action. Accordingly, Johnson cannot establish a prima facie case of retaliation based on those allegations. Therefore, summary judgment is granted as to the claim that Irwin and Archer's conduct constituted retaliation.

4. Count III: § 1981 Claims & Constructive Discharge

In Count III of her amended complaint, Johnson asserts that the same conduct alleged in Count's I and II constitutes discrimination in violation of 42 U.S.C. § 1981. However, discrimination cases under § 1981 and Title VII are analyzed in the same manner. *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 176 (7th Cir. 1996). Therefore, summary judgment on all the § 1981 claims asserted in Count III are hereby granted in favor of all defendants.

5. Count IV: Intentional Infliction of Emotional Distress

In Count IV of her complaint, Johnson asserts an Indiana tort claim of intentional infliction of emotional distress against Johansson and Archer. The Indiana Supreme Court has defined the tort of intentional infliction of emotional distress as "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is

subject to liability for such emotional distress." *Cullison v. Medley,* 570 N.E.2d 27, 31 (Ind. 1991)(citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)). The court went on to say that "[i]t is the intent to harm one emotionally that constitutes the basis for the tort...." *Cullison,* 570 N.E.2d at 31. In employment cases, the Indiana courts have been reluctant to award damages for this tort. *McCreary v. Libbey-Owens-Ford* Co., 132 F.3d 1159, 1167 (7th Cir. 1998).

Johnson presents evidence that: (1) she was denied two promotions; (2) work was saved for her; (3) she did co-workers work, but co-workers were not expected to help her; (4) her supervisor accused her of sharking; (5) her supervisor was going to watch and take notes on her; and (6) that another employee was permitted to blame Johnson for her inability to get her job done on time. Johnson has presented no evidence that either Archer or Johansson intentionally or recklessly inflicted emotional distress on her. In fact, Johnson testified at her deposition that she did not know whether or not Archer or Johansson intended to inflict emotional distress upon her. (Johnson Dep. at 204). The evidence presented by Johnson is insufficient to show that Archer or Johansson intended to harm her emotionally.

The conduct alleged by Johnson, to the extent it was even directed toward Johnson, is not the sort of extreme and outrageous conduct the *Cullison* court intended for this type of tort. *See McCreary,* 132 F.3d at 1167; *Cullison,* 570 N.E.2d at 31. The defendants' motion for summary judgment on the plaintiff's claim for intentional infliction of emotional distress is hereby granted.

V. CONCLUSION

For the reasons herein set forth, the court: (1) denies plaintiWs motion to strike; (2) denies in part and grants in part defendants' motion to strike; and (3) grants defendants' motion for summary judgment.

So ordered this 26th day of September, 2000.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana
Indianapolis Division

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APPENDIX E

NORDSTROM
130 S. Meridian St.
Indpls., IN 46225
317-636-2121

August 5, 1996

PLA Committee
Martin University
2171 Avondale Place
Indpls.,IN 46218

Dear PLA Committee,

It gives me great pleasure to write this letter in behalf of Gail Johnson. I am a former Account Executive for several fragrance marketing companies and currently I am the Assistant Manager of the Cosmetic Department at Nordstrom.

I have had the opportunity to work with Gail for several years. Because I work with her on a regular basis, I am qualified to attest to her abilities and competence.

Gail is a model employee. Because of her eagerness and willingness to learn, she has gained an excellent working knowledge of the marketing industry. She has learned to successfully market products and she has an excellent rapport wilh other staff and personnel. Though she is not in a position to hire, I consult with her regarding new hires and I respect and accept her opinions and recommendations readily. I also

feel confident in her ability to conduct interviews.

Gail has developed remarkable supervisory skills which has been demonstrated by past and present positions that she has held as Counter Manager. She is our top producer, she is motivated and a motivator. She is proficient at doing the employee schedule. She is in daily contact with the public by phone, mail, and in person and has developed excellent communication skills. She attends seminars on a an average of 3 to 4 or more times per month.

I hope this letter is sufficient in helping Gail obtain the credit that she is seeking for this class, which I feel that she deserves.

Sincerely,

/s/_____
Richard Archer

APPENDIX F

EXCERPTS OF GAIL JOHNSON'S NOTES

NOTES

12/96 I spoke with Rich Archer in regards to the asst. manager's position. I told him that I was interested in applying for the position. He told that he would take my interest into consideration and let me know when he would be interviewing.

1/4/97 New hire orientation. I was scheduled to attend because I never received register training or orientation. J. J. stopped in and introduced himself and asked everyone else to do the same and also tell why they wanted to work for Nordstrom. When my turn came I stood up and told him, in from of everyone, that my reason for coming to Nordstrom was upward mobility, that I was interested in a company that allowed growth and I was interested in a management position. And also because Tamara Stratford, my interviewer, told me that they would work with my school schedule as I wanted to further my education.

1/97 Maria Bowden, the Beauty Director fired. I called Mr. Johannson a few days later to let him know that I would like to interview for the Beauty Director position because I felt that I was qualified, and I thought that he was doing the interviewing. I told him my qualifications and he told me that I was more than qualified and to go for the position. He told me that Rich Archer would be doing the interviewing.

Excerpts Gail Johnson's Notes

2/12/97 Interviewed with Rich Archer for Beauty Director position.

2/13/97 Scheduled day off.

2/14/97 Mr. Archer informed me that he gave the position to Deanne Bennett. I asked him what he based his decision on, how Ms. Bennett's qualifications and experience compared to mine. He told me that qualifications and experience had nothing to do with it, that he based his decision solely on the fact that Ms. Bennett had more seniority as she previously worked for another Nordstrom store and she had a better feel for the Nordstrom customer. I then told Mr. Archer that since coming to Nordstrom I had not received a performance evaluation or a raise, that I had spoken to personnel and they told me that raises were given at the manager's discretion. Mr. Archer told me that I was already at the top, that I was going no further and there were no raises forthcoming. He then asked me if I was alright. I was very upset by his remarks.

I spoke with J. J. a few days later and he told me that Rich was the decision maker and he stood behind Rich's decision.

Connie Hunter was upset over Mr. Archer's choice. She asked him how he could justify giving the position to so someone who doesn't have overall cosmetic knowledge. He told her that if she valued her job, she'd better mind her own business.

2/18/97 I filed a discrimination complaint with EEOC because I felt that I was the better qualified candidate for the

Beauty Director's position.

2/26/97 Took 30 minute lunch break because Robin was scheduled for SWAT meeting and I had no lunch relief. I went to the asst. manager [Kelly Moistner] and explained to her that Robin was scheduled late but she had a SWAT meeting from 1:00 - 4:30 and I offered to go to lunch early because this was our slow time. She said yes and I went from 12:15 to 12:45. I went to Mr. Archer and explained and offered to leave early another day or come in later so that I would not be into overtime. He told me not to worry about it, that it was not and issue. [Was previously and issue].

3/31/97 All store meeting at 8:00 A.M. I was ill and did not attend. Took alka seltzer plus and tylenol. Shift 1-9:30. When I arrived at work, Robin told me that Rich Archer and Dee Bennett stood and observed a black customer in the fragrance area. Neither approached the customer. Robin was with a customer and Mr. Archer and Ms. Bennett both interrupted her and requested that she wait on the customer. Her customer left while she was giving the black customer samples, a white female customer entered the area. Mr. Archer walked over to the customer and rang her sale. Rich Archer cried today, very upset.

4/1/97 Calvin Klein lunch at Palomino's with Christy Bartee [rep] and Connie Hunter.

4/2/97 scheduled day off

4/3/97 Connie Hunter [a white female] called off, ill with strep throat. She called at 8 P.M. and told Kelly that she would not be in the following day, 4/4. Took 30 min lunch

break with kelly's approval because there was no lunch relief. Kelly asked me to come in early on 4/4 to cover early shift. Original shift 11-7:30.

4/4/97 Mr. Archer off today. I spoke with Dora Whitacre [the Shiseido make-up artist, black female] and she told me that Dee Bennett asked for her assistance in doing a consultation and make-over on a customer in the beauty studio because Ms. Bennett said that she had no idea what to do. Ms. Whitacre stated that Ms. Bennett has told her on several occasions that she [Ms. Bennett] has no idea what she is doing. Ms. Whitacre is training Ms. Bennett on how to do makeovers. Connie sick.

***

she had never. I told her that my customer, Mr. Maddox, came in to pick up Issey that I had on hold for him. She told him that she could not find the merchandise and she sold him something else and rang on her own number. She denied doing this. I told her that I had no idea the customer had been in the store for his merchandise because it was still on the hold shelf. The customer bought the merchandise back because he was upset that she sold him something that he didn't want, that she told him it was the same as what he wanted. Customer explained his problem to Robin, told Robin that Gail called him to tell him fragrance was in but the other lady could not find. Robin came to stockroom and got me. He explained his problem and I told him that his fragrance was still on hold shelf and I went and got it. He thanked me and told me that wished I was there on thursday when he came in. I told him that I was but no one bothered to find me. He gave me the receipt for the return

merchandise and her number was on it. Otherwise, I would not have known. I also told her that she failed to ring a DK hold and a Tiffany/men hold on my number. I called these people to let them know their merchandise was in and the sale never showed up on my number. She insisted that she put the sales on my number. I told her that I never wished to be unfair to her and that I would replace the sale. I then told her that in the future if one of us had a problem with the other, we would communicate. We agreed and shook hands. I rang a sale transaction #1627, and put on Connie's number and gave her the receipt. One of my customers came in today and bought Lemale and Issey. He turned and saw me and looked surprised. When he finished, he came over to me and said that he was sorry, that he didn't see me, that he was told that Patrece nor I worked there anymore. He was the third customer to tell me this. Not feeling well today.

4/20/97 scheduled day off

4/21/97 Mr. Archer announced in our morning meeting that Lynette Irwin has been promoted to asst. mgr. There was complete silence in the room. Ms. Irwin was our part time sales person. She has no cosmetic experience. Mr. Archer waited on an Obsession/women customer and gave sale to Lynette. Robin told me that in March, Lynette could not finish her books in the allotted time, so she went home. Said that she would finish later. I was told that books had to be finished the same day. I came in today at 7:13 to do Aramis scan count. Finished at 8:15 and went to stockroom to organize shelves. Finished at 9:15. Went to get tea, muffin, and money bags to open registers.

4/22/97 Book day. Books not in. I counted on paper.

I spoke with Kelly last night about book situation. She told me to work mid shift on 4/22 because she called Chicago and they told her that books would not be in until Thursday, 4/24. She told me to do books at a later date. Patrece in town, came to visit. Return in Angel, customer said that she did not want, that frag was not the same. Tried to talk her into purchasing another. She left area and came back, decided to give it another try. Not feeling well.

4/23/97 scheduled day off. I woke up with extreme headache and chest pains. I called Dr. Foley and he told me to come in. He told me that stress was causing headaches, chest pains, mood swings, anxiety and depression. Dr. Foley gave me a prescription for anti-depression and stress.

Put Starr on punishment for 2 weeks because of her smart mouth.

4/24/97 Shift 1-9:30. Arrived at 12:45. Went to personnel to pick up leave of absence form for foot surgery. No one in, left message under door. Lynette helped a customer and called Shelley over to ring the sale. I was standing there. Lynette went to dinner before I returned from dinner, and left area uncovered. This is inappropriate. I was told never to do this. Connie gave notice, said that she could not live with decision regarding Lynette. Julie Jeffers gave notice day before for same reason. Lynette told me to come in on friday and do books.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Case No. IP97-1673C H/G

GAIL B. JOHNSON,
Plaintiff,

NORDSTROM, INC.,
JAMES M. JOHANSSON,
and RICHARD J. ARCHER,
Defendants.

AFFIDAVIT OF GAIL JOHNSON

1. I am over the age of 18 and am competent to testify to the matters herein.

2. I am the Plaintiff in this matter.

3. I am making this Affidavit directly in response to the "facts" presented by the Defendants in their Motion for Summary Judgment.

4. This Affidavit is not meant to alter my deposition testimony in any way but is meant to respond to accusations levied against me after my deposition and

to correct inaccuracies and misstatements made by various witnesses after my deposition in this matter.

5. While employed by Nordstrom, I did not receive a performance evaluation or review.

6. When I was interviewed by Richard Archer ("Archer") for the position of Beauty Director, he had every opportunity to inform me of any insufficiencies or weaknesses in my performance. He never mentioned any.

7. I did not receive a new-hire training until two (2) years after my date of hire. I learned of the promotional process by word of mouth from co-workers.

8. In my opinion, based upon my years of experience in the cosmetics industry, Archer's revenue had nothing to do with his personal abilities. Archer had a good productive staff of employees.

9. While I admit that eight of the ten employees who complained to Karen Gall ("Gall") about Archer were white, that number is deceptive. At that time there were only two (2) black employees remaining in Archer's department - myself and Cynthia Ward.

10. I complained to Gall about a "day off" because Archer gave the requested "day" off to my white co-worker who did not request the day off.

11. White employees were scheduled off two (2) days in

a row on a regular basis and overtime was not an issue for the white employees. Archer never gave me an explanation for altering my schedule.

12. The proper title for the position to which I transferred after my first six (6) months of employment was Men's Fragrance Counter Manager.

13. I was never informed by anyone at Nordstrom that my job performance was lacking or needed improvement.

14. Lynette Irwin ("Irwin")never asked me to assist Kristina Jobe with anything.

15. I never received any verbal or written reprimands for her my or interactions with my co-workers.

16. On one occasion, I told Archer that there was tension in the department that I felt was directed towards me and asked if he knew why.

17. During my employment at Nordstrom I was never disciplined or counseled about being a "shark".

18. Prior to the deposition in this matter of Irwin wherein I was accused of being a "shark", I had never before heard the term.

19. I did not "stack" customers.

20. I did not "manipulate" my breaks. I merely tried to work as much as possible and remain on the selling floor for as long as possible.

21. Archer never discussed breaks or overtime with me.

22. I was productive in crucial areas outside of selling.

23. I was never counseled or disciplined regarding a failure to regularly perform stock work, develop my business and meet the monthly goals set for each of my fragrance lines.

24. The individual who was hired for the position of Beauty Director (Dee Bennett), held only two five (5) minute training sessions from February 1997 and November 1997.

25. Archer told me that experience and qualifications had nothing to do with his decision to select Bennett for the position of Beauty Director. Archer advised me that his decision was based solely on the fact that Bennett had more seniority at Nordstrom and had a "better feel for the Nordstrom customer".

26. I admit that Archer says I never expressed an interest in the Assistant Manager position. I do not, however, admit that I failed to express an interest in the position to him. In fact, I expressed my interest to Archer more than once and had even filed a charge of discrimination over my failure to be promoted by Archer.

27. When she was selected as Beauty Director, Bennett had 18 months of cosmetic experience compared to my 13 years. I possessed more cosmetic knowledge and experience than Bennett and more in-store

seniority.

28. As a co-worker, I was able to assess Bennett's performance.

29. When she was selected as the Assistant Manager, Irwin was only a part-time employee and had less seniority than I did.

30. During my employment there, Nordstrom had no policy of posting job openings or promotional opportunities.

31. Irwin approached me because another employee had told Irwin that I had given her a dirty look during a meeting. I did not give Irwin a dirty look.

32. Although my sales remained high, I was affected emotionally and mentally by Nordstrom's behavior and failure to remedy the situation.

I declare under the penalties of perjury that the foregoing is true and correct.

Date: May 6, 1999 /s/_____
GAIL JOHNSON

STATE OF INDIANA)
)
COUNTY OF MARION)

Before me, a Notary Public in and for said County and State, personally appeared Gail Johnson, who acknowledged

the execution of the foregoing this 6th day of May, 1999.

/s/
Kelli R. Keller
Marion County
My Commission Expires
January 28, 2007

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Case No. IP97-1673C H/G

GAIL B. JOHNSON,
Plaintiff,

NORDSTROM, INC.,
JAMES M. JOHANSSON,
and RICHARD J. ARCHER,
Defendants.

AFFIDAVIT OF RUBY HARRIS

1. I am over the age of 18 and am competent to testify to the matters herein.

2. My name is Ruby Harris and my home address is 340 E. 38th Street, Apt. 207 Indianapolis, Indiana 46205. My home telephone number is (317) 924-4254. I am an African-American female.

3. I was employed at Nordstrom from the time they opened in September of 1995 until March of 1996 in the concierge department.

4. While an employee of Nordstrom, I was told that black customers frequently were followed by security personnel.

5. At Nordstrom, there were security cameras set up in areas where a high concentration of black employees worked so they could be watched. There were no security cameras set up where a high concentration of white employees worked.

6. If there was a store theft, it was always the black security guards that were told to chase after them. I never saw the white security guards chase after thieves.

7. During my employment at Nordstrom, there were at least three occasions when a manager position opened up that I applied for. I was very qualified for each position, but was never given the opportunity to even interview for any of the positions.

8. While I was employed at Nordstrom, there was an employee, Tom, who also worked there. One day while the O. J. Simpson trial was going on, Tom and I were discussing it and Tom made a remark that *"niggers just do stuff like that"*.

9. One day Tom called me a "nigger bitch". I went to personnel to report this name calling and spoke with a young, blonde girl who told me that I needed to speak with J. J. Johansson, the store manager. It took a couple of weeks before I could get a scheduled appointment with Mr. lohansson. When I finally spoke

with Mr. Johansson about what happened with Tom, he told me that I was crazy and that I did not hear what I did.

10. Shortly after my conversation with Mr. Johansson, Tom became the "employee of the month".

11. During Black History Month, Nordstrom has a special display in honor of it. A black artist by the name of Pat Gaines brought in her paintings for the display and asked Nordstrom for lights and easels. Nordstrom told her that it was her problem to take care of. However, when a white artist came in to display his paintings, Nordstrom was very accommodating to him and provided him with lights, easels and anything else he needed.

12. In my spare time, I design African-American style clothing. I spoke with Nordstrom about potentially selling my clothes and they would not consider it.

13. During my employment with Nordstrom, they had a serious problem of racial discrimination. The problem was so bad that I felt I had no choice other than to resign my position.

I declare under the penalties of perjury that the foregoing is true and correct.

Date: May 7, 1999

/s/
RUBY HARRIS

Affidavit of Ruby Harris

STATE OF INDIANA)
)
COUNTY OF MARION)

Before me, a Notary Public in and for said County and State, personally appeared RUBY HARRIS, who acknowledged the execution of the foregoing this 7th day of May, 1999.

/s/
Kelli R. Keller
Marion County
My Commission Expires
January 28, 2007

APPENDIX I

GAIL JOHNSON DEPOSITION

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Q What event occurred on February 14, 1997, that you claim was discrimination?

A When Mr. Archer passed me over for the beauty director's position; he told me he had given it to someone else.

Q And who did he give it to?

A Deanne Bennett.

Q What did Mr. Archer tell you about that position?

A I don't under- -- I don't fully understand your question, sir.

Q You told me that he informed you that -

A Yes.

Q - that he gave the position to somebody else. What did he tell you?

A Oh, okay. He told me that he had given the position to Ms. Bennett because she had more seniority than I, and she had a better feel for the Nordstrom customer. And also that my qualifications and my experience is - didn't mean anything to him.

Q Anybody present during this conversation?

A No.

Q When did the conversation take place?

A On February 14th.

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Q Where did the conversation take place?
A At the beauty director's desk.
Q Take a look at the box with the narrative, and in particular, the second paragraph. In there you state, "On February 14th, 1997, Mr. Archer informed me that he had made a decision and that he had selected Dee Bennett for the position." Correct?
A Yes.
Q And then in the next sentence you state, "He indicated that the basis of his decision was that she had more seniority which the company -- with the company and had a better feel for the Nordstrom customer." Correct?
A Yes.
Q I don't see anything in there stating that Mr. Archer told you that your qualifications and experience didn't mean anything to him.
A Apparently I neglected to tell the investigator or they neglected to write that in there.
Q Do you recall which it is?
A No, I don't.
Q As you sit here today, do you know whether or not you told the investigator that?
A Yes, I definitely told the investigator that.

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Q Did you review this charge of discrimination? After it was completed, did you review it before signing it?
A Yes, I did.
Q And at that point in time, did you bring up to the investigator that that was not included in this charge?

A No, I didn't. I failed to see that.

Q Do you recall the name of the investigator who participated in filling out this charge?

A David Tite.

Q Was there anyone else involved who helped you fill out this charge?

A No.

Q Did Mr. Tite type - type this up?

A Yes.

Q Why is it that you believe that Mr. Archer's selection of Dee Bennett was discriminatory towards you?

A Because the beauty director's position requires overall cosmetic knowledge, and I had more knowledge than Ms. Bennett did, I had more experience than Ms. Den- - Ms. Bennett. Excuse me.

Q And what's the basis of your claim that you had

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more knowledge than Ms. Bennett?

A Because I have been in cosmetics 13 years; Ms. Bennett had one and a half years on one line. I'd had cosmetic experience on several lines.

Q And how do you know Ms. Bennett only had one and a half years of cosmetic knowledge? A She told **me.**

Q When did she tell you?

A She told me the day that she came in to apply for a job.

Q And what job did she apply for?

A She was applying for the position that I was leaving, Clinique consultant.

Q And do you recall when that was?

A I don't know the date.

Q Was this the one -- so she had one and a half years' experience prior to coming in and applying at Nordstrom?

A Yes.

Q And how long was she at Nordstrom before getting the beauty director position?

A I don't remember at this time.

Q Can you give me an approximation? Six months, a year?

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A I don't remember the exact date. I remember - oh, it's - it's an incident in my notes, and it's during that time.

Q Okay. And who did you complain to?

A Well, that -- I went to Mr. Archer then.

Q You went to Mr. Archer?

A Yes.

Q And what was -- what did you tell Mr. Archer?

A About Lynette Irwin and the things that she was doing; how she -- it was - she told me that she was watching me and making notes of everything that I had done or that I was doing. And she accused me of stealing customers and stealing sales, and there was no basis for that, and Mr. Archer told me to work it out with Lynette.

Q Did you go to anyone else?

A No.

Q Other than the comment to Ms. Gall about having problems with Mr. Archer and going to Mr. Archer with a complaint against Ms. Irwin, any other complaints to anyone at Nordstrom?

A Not that I can recall at this time.

Q Is there anything that would help your memory on that issue?

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A I don't know.
Q Would it be - if you had gone some- somewhere to complain, would that have been in your notes?
A **Possibly. The only other individual that I spoke to was Mr. Johansson, and he told me that he supported Mr. Richard - Mr. Archer's decisions.**
Q And when did you speak to Mr. Johansson?
A **I don't - I don't remember the dates.**
Q Do you remember what you spoke to him about?
A **The being passed over for the beauty director.**
Q And what did you tell him?
A **Well, Mr. Johansson had already told me that I was qualified for the position and that I should apply for it, and I didn't understand how the decision was made, and he said that Mr. Archer was the decision-maker and it was his decision.**
Q Okay. What did you tell him with respect to your concerns about being passed over?
A **I don't remember.**
Q When was it that Mr. Johansson said that you were qualified for the position?
A **I don't remember the date.**

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Q Okay. Do you remember what he specifically said?
A **He asked me what my qualifications were. I told him, and he said that "You are more than qualified and go for the position, but Mr. Archer will be doing the interviewing; he's the decision-maker, and he will - will be doing the interviewing."**

Q What was it that brought up this conversation with Mr. Johansson about the beauty director position?

A The beauty director, to my knowledge, was terminated and that position was available.

Q Okay. Did you go to Mr. Johansson, then, and express an interest in the job?

A Not the same day, no.

Q Okay. At some point in time?

A A few days later, I called him on the phone and talked to him.

Q And is it during this phone conversation that he made the statement about you being qualified?

A Yes.

Q When you spoke with Ms. Gall about the problems with Mr. Archer, did you tell Ms. Gall that you

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felt you were being discriminated against?

A No, we never discussed that, we were on the floor.

Q When you met with Mr. Archer to discuss your problems with Ms. Irwin, did you tell Mr. Archer that you felt you were being discriminated against?

A No, I just told him that Ms. Irwin wasn't being fair to me.

Q When you discussed with Mr. Johansson being passed over for the beauty director position, did you express to him that you felt you were being discriminated against?

A Sir, I don't remember. I was upset.

Q You don't remember saying that you felt you were being discriminated against?

A It's possible, I don't - I just don't remember.

Q Okay. But as you sit here, you cannot say that you

did, in fact, say that you were being discriminated against?
A I'm sorry, repeat that.
Q I said, as you sit here today, you cannot specifically say that you said that you were being discriminated against?

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only physician that you're seeing with respect to the stress; correct?
A Yes.
Q I've handed you what's been marked as Exhibit 6. If you would, take a moment to look this document over.
A (Reviews document.)
Q Exhibit 6, is that plaintiff's response to Nordstrom's discovery?
A Yes.
Q And on page 22, is that your signature at the top of the page?
A Yes.
Q And you signed this document indicating that the responses contained here are true and accurate?
A To the best of my ability, yes.
Q Did you review"Plaintiff's Response to Defendants' First Request for Discovery" prior to it being served on defendant?
A I believe I did, yes.
Q Okay. Did you review it and then sign it?
A Yes.
Q Okay. Was there anything in here after you reviewed it that you thought was inaccurate?

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A Not that I noticed at the time.
Q In your review now, is there anything in there inaccurate?
A I didn't see anything, at least nothing stood out, no particular...
Q Turn to page 4, if you would.
A (Witness complies.)
Q The first full paragraph, with respect to the beauty director position, we've been over your testimony about your qualifications and why you feel you have more experience than Ms. Bennett. In - in this response, however, I think's the first time you mentioned that you had more education than Ms. Bennett.
A Yes.
Q Okay. What is the basis of that statement that you have more education than she does?
A I believe, after talking with Ms. Bennett, I -- I discovered that I had more educational background than she did, and experience.
Q Okay. What was your understanding of her educational background?
A She told me that she had, I don't know, a management -- she'd done -- she went to school for something in management. I'm - I don't

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recall exactly.
Q Okay. And what education did you have that you felt was more than she had?

A I have a professional sales license, I am a professionally trained salesperson, and my classes at Martin University.

Q Okay. And what were your classes at Martin University geared towards?

A Marketing.

Q The beauty director position was not a sales position; correct?

A No, not totally.

Q Did the beauty director, did it supervise employees?

A No.

Q But its focus was not on sales?

A No.

Q You also indicate in that first paragraph that your performance was better than Ms. Bennett's. What are you talking about there?

A My performance was better than Ms. Bennett's in that I - I was the top salesperson.

Q So you're indicating with respect to performance only in the sales area?

A No. I - I can't compare my customer service

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to hers, but I had good customer service also.

Q Okay. But like you said, you couldn't compare it to hers?

A No, because I didn't know what kind of documentation or anything that she'd ever received.

Q The sales certificate that you had, what was that in?

A Sales certificate?

Q Yeah, I believe -- I thought you said just a few minutes ago that with respect to your education you had a